Applicant Details

First Name	**Victoria**
Middle Initial	**M**
Last Name	**Guevara**
Citizenship Status	**U. S. Citizen**
Email Address	**victoriaguevara@law.miami.edu**
Address	**Address** Street **5600 Collins Avenue** City **Miami Beach** State/Territory **Florida** Zip **33140** Country **United States**
Contact Phone Number	**3055099081**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Miami School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=51003&yr=2013**
Date of JD/LLB	**May 1, 2024**
LLM From	**University of Miami School of Law**
Date of LLM	**May 1, 2024**
Class Rank	**I am not ranked**
Law Review/ Journal	**Yes**
Journal(s)	**International and Comparative Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Dawson, Andrew B.
adawson@law.miami.edu
(305) 284-8446
Redmond, Patricia
predmond@stearnsweaver.com
305-789-3534
Okamoto, Karl
ko54@drexel.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

VICTORIA GUEVARA
5600 Collins Avenue, Apartment 12A, Miami Beach, Florida 33140
victoriaguevara@law.miami.edu · (305) 509-9081 · www.linkedin.com/in/victoriaguevara17/

June 11, 2023

The Honorable Judge Bess M. Parrish Creswell
United States Bankruptcy Court
Middle District of Alabama
One Church Street
Montgomery, Alabama 36104

Dear Judge Creswell:

I am a third-year student at the University of Miami School of Law and wish to apply for a 2024-2025 clerkship in your chambers. I have visited Alabama a few times, mainly in Mobile and Birmingham, and have only fond experiences. I would welcome the opportunity to go back, and explore more cities and towns in the state.

While bankruptcy law may seem boring to some, to me, it is a unique and pervasive field that never has a dull moment. My first-year contracts professor, a former clerk, wove in interesting stories about bankruptcy. I was fortunate enough to obtain an internship in Judge Robert Mark's chambers my first summer, and I haven't looked back since. I have interned for Chief Judge Laurel Isicoff, received the CALI award in international bankruptcy, and am now a Bankruptcy Bar Association of South Florida inaugural Summer Scholar for this summer 2023.

I specifically want to clerk in your chambers because I want to learn more from a female judge that is so passionate about bankruptcy. Not only do I have substantive bankruptcy experience, but I have also had non-bankruptcy experiences that would aid me as a clerk. During my jobs as a law clerk and now as a summer associate, I have drafted litigation pleadings and memoranda, which sharpened my writing and research skills. As a Dean's Fellow for Civil Procedure, I learned how to break down the rules so that the first-year students could understand. This year, as an Executive Editor for a law journal, I will further improve my writing and research skills.

My resume, writing sample, and unofficial transcripts are enclosed. Recommendations will be forthcoming from Professor Patricia Redmond and Professor Andrew Dawson. I would welcome the opportunity to interview with you, and look forward to hearing from you.

Sincerely,

Victoria Guevara

VICTORIA GUEVARA
5600 Collins Avenue, Apartment 12A, Miami Beach, Florida 33140
victoriaguevara@law.miami.edu · (305) 509-9081 · www.linkedin.com/in/victoriaguevara17/

Education and Credentials

University of Miami School of Law, Coral Gables, FL
Juris Doctor and LL.M in Taxation expected, May 2024

GPA:	3.337/4.000
Law Review:	International and Comparative Law Review**,** Executive Editor (2023-2024)
Clinic:	Elanor R. Cristol and Judge A. Jay Cristol Bankruptcy Pro Bono Assistance Clinic, Fall 2022
Programs:	Dean's Fellow, Civil Procedure I, Fall 2022; Litigation Skills Program (Civil), Spring 2023
Clubs:	Asian Pacific American Law Student Association (APALSA), Vice President (2022-2023)
	St. Thomas More Society, Historian (2022-2023)
	Miami Law Student Ambassador Program
Awards:	Bankruptcy Bar Association of South Florida Inaugural Scholar, Summer 2023
	CALI Excellence for the Future Award in International Bankruptcy, Spring 2023

University of Michigan – Ann Arbor, Ann Arbor, MI
Bachelor of Arts in Political Science, Minors in Economics, Russian and Ukrainian, May 2021

GPA:	3.503/4.000
Honors:	James B. Angell Scholar for three consecutive terms
	Pi Sigma Alpha Political Science Honors Society
	Ukrainian Language Scholarship, University Honors (3 semesters)
Study Abroad:	London School of Economics and Political Science, Summer 2019
Activities:	Beta Alpha Rho Pre-Law and Public Service Professional Fraternity, Vice President (2019-2020)
	Michigan Men's Rowing Team, Coxswain (2017-2019)

Professional Experience

Bleakley, Bavol, Denman & Grace, Tampa, FL, May 2023 to August 2023
SUMMER ASSOCIATE

- Utilize robust knowledge and understanding of multiple areas of law, including guardianship, workers' compensation, real estate litigation, administrative law, and consumer bankruptcy law, draft memorandum, demand letters, and pleadings, such as motions to dismiss and complaints.
- Attend and actively observe client meetings and depositions to acquire additional knowledge of the legal process.

U.S. Bankruptcy Court for the Southern District of Florida, Miami, FL
JUDICIAL INTERN FOR THE HONORABLE CHIEF JUDGE LAUREL M. ISICOFF, January 2023 to April 2023

- Supported Court proceedings in Chapter 7, 11, and 13 hearings and issues by conducting legal research and preparing required memoranda, and acquired in-depth knowledge of bankruptcy proceedings through court observations.
- Collaborated with court staff to organize, monitor, and maintain the court's weekly calendar, and prepared bench memorandum to aid Judge Isicoff in complex matters.

JUDICIAL INTERN FOR THE HONORABLE JUDGE ROBERT A. MARK, May 2022 to July 2022

- Provided diligent assistance to the Court in a broad range of bankruptcy matters through legal research and writing.
- Studied bankruptcy proceedings and the application of the bankruptcy code by observing court proceedings.

Ainsworth + Clancy, PLLC, Miami, FL, May 2022; July 2022 to August 2022
LAW CLERK

- Drafted requests for production, admissions, and interrogatories which honed judicial writing skills and advanced litigation understanding, and prepared answers to discovery requests received by clients as well as composed complaints and civil theft letters.

Additional Information

LANGUAGES: Proficient in Russian and Ukrainian. Basic knowledge of Spanish and Turkish.
INTERESTS: Rowing, marathon running, playing the piano and violin, and teaching alpaca yoga.

June 20, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am writing in support of Victoria Guevara's application to serve as your law clerk based on my observations of her in the classroom for Contracts in her first year and supervising her law review note on cross-border insolvencies. In addition, I have counseled Victoria (Tori) as she has pursued an interest in bankruptcy law.

Tori is now a strong writer and is very interested in bankruptcy law. It has been a pleasure to see her develop as a writer and to see her find a passion for bankruptcy. Ever since her first semester, I could tell she was a bright and eager student. She earned one of the top grades in our Contracts midterm, which was a multiple-choice assessment of the doctrine. However, in that first semester, her legal writing was only average, and she earned an overall "B" grade in the course. Since then, she worked diligently to improve her writing skills and has steadily earned stronger grades each semester.

Along the way, she has developed a keen interest in bankruptcy law. She wrote her student note on Chapter 15 of the Bankruptcy Code (which I have supervised); she has served in the Eleanor R. Cristol and Judge A. Jay Cristol Bankruptcy Pro Bono Assistance Clinic; and she was admitted into the inaugural BBA Scholars Program created by South Florida's Bankruptcy Bar Association. The BBA Scholar positions are awarded to students who not only have a strong academic background and interest in bankruptcy but who also exhibit a commitment to civility, ethics, and professionalism.

In addition, Tori is an active and productive member in our Law School, serving on several student organizations and leadership roles. Through these roles, she has shown a high level of professionalism and energy, which I believe would translate into being a good addition to your chambers.

Sincerely,

Andrew B. Dawson - adawson@law.miami.edu - (305) 284-8446

June 18, 2023

Re: Judicial Clerkship Application of Victoria Guevara

Dear Judge:

I am writing to recommend Victoria Guevara for a position in your chambers as a judicial clerk. Victoria is a third-year law student at the University of Miami School of Law. I had the pleasure of working with Victoria when she completed my course in Business Associations last semester. I know Victoria to be one of those unusual law students who has demonstrated an early interest in commercial law and an eagerness to engage with the quantitative challenges most law students shy away from. I strongly recommend her for a position with a U.S. Bankruptcy Court, knowing that she will come both prepared and motivated to succeed in it.

Victoria successfully completed my Business Associations course, with a final grade that placed her in the top half of the class. My course does include the typical casebook reading assignments and discussion of core doctrine. Victoria was a reliable class participant, often carrying the day when the problem involved numbers.

In addition to the typical class discussion, I introduce students to aspects of business law practice through a series of weekly simulation exercises. In these exercises, each student is asked to roleplay as a business lawyer providing advice to a client. In one exercise, they advise an entrepreneur on the best form of organization. In another, they speak to a new board member about potential liability. In a third, they advise a startup on the proposed terms for an angel financing. In all the exercises, the student is asked to apply the principles they are learning in the reading and the lectures to a real-world scenario. For me, the recordings of these roleplays provide a kind of "game tape" opportunity to assess how students are integrating their understanding of the black letter law into practice. Among my sixty students last semester, Victoria was one of the most dedicated. She brought to the exercises a level of creativity, thoughtfulness, and analytical acuity that stood out and reflected her strong interest in becoming expert in this area of practice.

Based on my experience of her, I can wholeheartedly recommend Victoria for the position of judicial clerk. She will be an asset to any chambers. I am confident that her participation will benefit both her and the Court.

If I can answer any further questions, please do not hesitate to contact me on 1.267.934.1391.

Sincerely,

Karl S Okamoto

Karl S. Okamoto
Professor of Law
Thomas R. Klein School of Law, Drexel University
Visiting Professor of Law, University of Miami, Spring 2023

VICTORIA GUEVARA
5600 Collins Avenue, Apartment 12A, Miami Beach, Florida 33140
victoriaguevara@law.miami.edu • (305) 509-9081 • www.linkedin.com/in/victoriaguevara17/

I prepared the attached memorandum while working as an judicial intern for Chief Judge Laurel M. Isicoff in the Bankruptcy Court for the Southern District of Florida. Due to the complicated nature of the case, the memorandum examines the pleadings by Debtors in a Chapter 13 case, and addresses the whether the Association may be relieved from liability and damages assigned to it by Judge Isicoff before receivership now that there was a receiver and new evidence.

To preserve confidentiality of the Court, all individual names, locations, and other identifying facts have been changed. I have received permission from the court to use this memorandum as a writing sample. The writing sample is in its original format and has not been edited by any person besides myself.

BENCH MEMO

TO: Chief Judge Laurel M. Isicoff

FROM: Victoria Guevara

RE: Association's Motion for Relief from Orders Finding Liability and Damage

DATE: [redacted] 2023

QUESTION PRESENTED

1. Whether the Association may be relieved from liability and paying damages, as determined by the Court in ECF [redacted], under applicable law.

BRIEF ANSWER

1. The Association may not be relieved from liability and paying damages, as determined by the Court, because the Association acted in bad faith and there is no new evidence.

APPLICABLE LAW

I. Receivership

In arguing that a receivership "cleanses" a corporation, the Association cited to *Freeman v. Dan Witter Reynolds, Inc.*, where the Second DCA opined that the sins of a corporation's principals do not transfer to the corporation. 865 So. 2d 543, 550 (Fla. 2d DCA 2003). The Association then cites to a few federal cases supporting its argument that an association is "cleansed" when a Receiver is appointed. *See Scholes v. Lehman*, 56 F.3d 750, 754 (7th Cir. 1995); *Court Appointed Receiver of Lancer Offshore, Inc. v. Citco Group Ltd.*, 2011 WL 1232869. *4 (S.D. Fla. 2011); *Perlman v. American Express Centurion Bank*, 2020 WL 10181895, *4 (S.D. Fla. 20020). In additional support, the Association cites to Florida Statutes Section 501.207(3), which states that a court may appoint a receiver to bring actions on behalf of the enterprise without regard to any wrongful acts committed by the enterprise.

The Association then spent time on the "adverse interest" exception to *in pari delicto*, which makes sense because the orders that the Association referred to in its pleadings hold both Ms. Gallego and the Association liable for damages. Using cases from both the Second DCA and the 11th Circuit Court of

Appeals, the Association explains the adverse interest exception: if an agent's misconduct is "calculated to benefit the agent and harms the corporation. . . the agent's misconduct is not imputed to the principal." *See O' Halloran v. PricewaterhouseCoopers LLP*, 969 So. 2d 1039, 1045 (Fla. 2d DCA 2007); *Beck v. Deloitte & Touche*, 144 F. 3d 732, 736 (11th Cir. 1998). Under a case decided by Judge Kimball in 2010, the Association argues that the standard for applying this exception is whether the corporation "received any benefit from the agent's misconduct." *In re: Phoenix Diversified Inv. Corp.*, 439 B.R. 231, 242 (Bankr. S.D. Fla. 2010). If the adverse interest exception applies, the corporation is not subject to the *in pari delicto* defense.

II. Rule 60

Rule 60(b)(2) of the Federal Rules of Civil Procedure, adopted by Bankruptcy Rule 9024, states that a court may relieve a party from a final judgment based on new evidence, among other things, that could not have been discoverable in time to move for a new trial under Rule 59(b). However, there was no case law cited by the Association in support of what constitutes new evidence, and what determines if the evidence could not have been discoverable. Similarly, the Debtors' argument does not contain any supportive case law but just responds to the claims of new evidence by stating that the evidence presented by the Association is not new.

ARGUMENTS AND ANALYSIS

I. Analysis of the Association's Receivership Arguments and Debtors' Responses

At its core, this case presents issues every lawyer has learned about in both business associations classes or tort classes: issues of agency. The Association, via the Receiver, makes a passionate argument saying (1) the Association as a corporation was "abused"; (2) the receivership "cleanses" the corporation; (3) the "adverse interest" exception applies; and (4) therefore, the Association should be released from liability. Each of these points will be explored with emphasis on the pertinent matters.

Although corporations have abilities and rights similar to human beings, like being able to hold property and being sued in its domicile, it is not a living, breathing thing, and cannot act for itself. Thus, through agency law, agents or principals of the corporation must act on its behalf. How the agents act on

behalf of the corporation is where things get tricky. What happens if the agents act out and use the corporation fraudulently? The Association used *Freeman v. Dan Witter Reynolds, Inc.* as a broad reminder that "sins" of the principals of a corporation "do not transfer to the corporation" itself. 856 So. 2d 543, 550 (Fla. 2d DCA 2003). The Association then characterized corporations improperly used for fraudulent activity as an "evil zombie" of the principal.

Then comes the receivership argument under Florida Statutes Section 501.207(3). However, this statute does not say that the appointment itself cleanses the corporation. It just states that a court can appoint a receiver, and such receiver can take actions in a forward-looking sense without having the past bad acts of the enterprise cloud it.

Significantly, the Association did engage in "bad acts" by violating the automatic stay in 20xx by filing the 20xx Lawsuit. Also, although the President of the Association ("President") was operating an Association vehicle at the time of the Incident, the Association did not contest the finding of contempt at that time. Further, the Association and President were represented by one counsel and filed a joint claim regarding both the 20xx Lawsuit and the Incident, when they could have had separate counsel and separate claims.

The Association then argues that although the Court's findings are based on "direct corporate liability" instead of vicarious liability, "direct corporate liability" still requires that the agent's conduct should be performed within the scope of their employment. However, after supporting case law is cited, there is no further argument as to whether the President acted within the scope of the President's employment or not, and how that should affect any findings by the Court. It is only mentioned later under the discussion of new evidence that the President did not act within the scope of Principle's employment.

The Association raises fair points about how the Receiver was not appointed until two months after the Court's Final Judgment, and also how, when the President and the Association were both represented by one counsel, the Association was not "freed" yet by the receivership.

II. Analysis of the Applicability of Rule 60

Although no case law was cited from either the Association or Debtors, Rule 60 of the Federal Rules of Civil Procedure is clear enough in that new evidence, among other things, that could not have been discovered in time to move for a new trial, is required for relief from judgment.

A. Timing

The Association claims that after years of persistence, law enforcement "finally" obtained sufficient evidence to charge the President with Charge 1 and Charge 2 in 20xx+1, and file additional charges against President in 20xx+2. However, the Association calls this evidence "sufficient" and not "new," but then proceeds to refer to the sufficient evidence as new, and claim that during those times, the Association was powerless to stop the President's conduct.

The Association also raises a fair point that the State Attorney's Office ("SAO") Affidavit was new evidence due to the Affidavit not being completed until after the Court entered the Final Judgment. However, the content of the SAO Affidavit, even being presented after the Final Judgment, is not "new" evidence because it just confirmed the already known Charge 1 and Charge 2.

Interestingly, in the most recent Motion filed by the Association, the Association claims that the Debtors have unclean hands. Although the hearing is not until [redacted], it will be interesting to see how the Debtors will respond based on those claims and affidavits.

CONCLUSION AND RECOMMENDATION

The Association raises very interesting points in its recent Motion, like allegations of unclean hands, that could be detrimental for the Debtors if true. However, notwithstanding the allegations of the Association's recent Motion, it seems like the Debtors have a stronger argument. The President's fraud was not new, even with the Affidavit, and although the Association was not "freed" until after the Final Judgment, it waited quite a bit of time before filing the Motion for Relief.

The Court would benefit greatly from ascertaining the reasons behind the timing delays, as well as verifying the statements in the new affidavits under ECF [redacted] if the Debtors do not respond by [redacted].

Applicant Details

First Name	**Parker**
Middle Initial	**G**
Last Name	**Jennings**
Citizenship Status	**U. S. Citizen**
Email Address	**pgjennings@crimson.ua.edu**
Address	**Address** Street **380 14 Pl E apt #313** City **Tuscaloosa** State/Territory **Alabama** Zip **35401** Country **United States**
Contact Phone Number	**870-270-2302**

Applicant Education

BA/BS From	**University of Arkansas-Fort Smith**
Date of BA/BS	**May 2021**
JD/LLB From	**The University of Alabama School of Law** **http://www.law.ua.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**Below 50%**
Law Review/Journal	**Yes**
Journal(s)	**Law and Psychology Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Campbell Moot Court Board** **Duberstein Bankruptcy Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Bazemore, Jarrod
JBazemore@ssp-law.com
205-873-1661
McMichael, Benjamin
bmcmichael@law.ua.edu
Fogle, Cameron
cfogle@law.ua.edu

References

McMichael, Benjamin
bmcmichael@law.ua.edu
Fogle, Cameron
cfogle@law.ua.edu
Bazemore, Jarrod
JBazemore@ssp-law.com
205-873-1661

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Parker Jennings
380 14th Pl E apt #313, Tuscaloosa, AL 35401
(870) 270-2302 — pgjennings@crimson.ua.edu

June 12, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am a rising third-year law student at The University of Alabama School of Law, where I serve as the Lead Articles Editor for the *Law and Psychology Review* and a member of the Campbell Moot Court Board and Duberstein Bankruptcy Moot Court Team. I appreciated you taking the time to interact with my bankruptcy class, and it would be an honor to serve a 2024-2025 term clerkship in your chambers.

I was introduced to bankruptcy law by Judge Jennifer Henderson, Chief Judge for the Northern District of Alabama Bankruptcy Court, in fall of 2022 through her bankruptcy law course. Judge Henderson's passion for bankruptcy was evident and contagious in each class. The practical implications and core principles of bankruptcy—for both individuals and businesses—quickly made it my favorite area of law. I was selected to my first-choice moot court team at the close of the 2L Alabama Law Moot Court Competition. This allows me to further my passion for bankruptcy law by competing on The University of Alabama Duberstein Moot Court Team in Miami and New York City in spring of 2024.

I also developed a passion for writing through law school and summer positions at litigation-focused firms. This passion led to me scoring more than ten points above median on my individual moot court brief in the 2L moot court competition. Additionally, I will serve as a judicial extern in the chambers of the Honorable L. Scott Coogler, Chief Judge of the United States District Court for the Northern District of Alabama this fall. I believe that my passion for bankruptcy and writing continues to prepare me to contribute meaningfully to your chambers.

My resume, undergraduate and law school transcripts, and writing sample are provided in my application, along with letters of recommendation from Professors Benjamin McMichael and Cameron Fogle and Mr. Jarrod Bazemore. Thank you for your consideration.

Respectfully,

Parker Jennings

PARKER JENNINGS

380 14th Pl E Unit #313, Tuscaloosa, AL 35401
870-270-2302 - pgjennings@crimson.ua.edu

EDUCATION

The University of Alabama School of Law, Tuscaloosa, AL
Juris Doctor Candidate, May 2024

- GPA: 3.314
- Lead Articles Editor, *Law and Psychology Review*, Vol. 48
- Duberstein Bankruptcy Moot Court Team
- Campbell Moot Court Board
- Full-Academic Scholarship

University of Arkansas- Fort Smith, Fort Smith, AR
Bachelor of Business in Business Marketing, English and Political Science Minors, May 2021

- First Bank Corporation College of Business Scholar
- Student Leadership Council, Officer
- Men's Golf Team, Two-year Captain
- Continuing Legal Education, Chair

WORK EXPERIENCE

Hon. L. Scott Cooger, Northern District of Alabama, Tuscaloosa, AL
Judicial Extern, Fall 2023

Gaines Gault Hendrix, Birmingham, AL
Summer Associate, Summer 2023

Brown Sims, Houston, TX
Summer Associate, Summer 2023

Smith Spires & Peddy, Birmingham, AL
Law Clerk, Summer 2022

- Provided research and drafting in the area of insurance defense litigation
- Drafted five briefs in support of motions for summary judgment
- Drafted memoranda and case summaries
- Researched legal issues and briefed attorneys in preparation for depositions

Home Surety Title & Escrow, Memphis, TN
Legal Intern, Summer 2022

- Provided legal research and support for real estate closing firm
- Oversaw the completion of more than 100 real estate transactions, including the preparation and execution of all necessary documents, coordinating the transfer of funds, and ensuring legal compliance.
- Worked closely with attorneys in office to clear title before closing

INTERESTS

Competing in amateur golf tournaments, watching Memphis basketball, and grilling

LAW OFFICES
SMITH, SPIRES, PEDDY,
HAMILTON & COLEMAN, P.C.
3500 COLONNADE PARKWAY
SUITE 350
BIRMINGHAM, ALABAMA 35243

THOMAS S. SPIRES
A. JOE PEDDY
TODD N. HAMILTON
THOMAS COLEMAN, JR.
CLARENCE RIVERS, IV
ROBERT B. STEWART
JENNIFER W. PICKETT
ROSEMARY S. MOORE
ANGELA C. SHIELDS
ETHAN R. DETTLING

www.ssp-law.com

TELEPHONE (205) 251-5885
FAX (205) 251-8642

JARROD B. BAZEMORE
PETER M. WOLTER
LESLIE M. HAND
JOHN M. GRAY, III
TERESA M. BRAY
LESLIE J. MINOR
TAYLOR T. PERRY, III

PAUL G. SMITH
(1936-2004)

Sender's Email: jbazemore@ssp-law.com

June 5, 2023

Dear Your Honor:

My name is Jarrod Bazemore, and I am an insurance defense attorney who has practiced in the industry for the past 25 years. It is my honor to recommend Parker Jennings for a Federal clerkship with the Honorable Court. Parker is a rising third year law student at the University of Alabama School of Law where he is Lead Articles Editor for *Law and Phycology Review*. He also was named to the Campbell Moot Court Board and recently to the Duberstein Bankruptcy Moot Court Team.

I had the pleasure of getting to know Parker when he clerked with our firm, Smith, Spires, Petty, Hamilton and Coleman, P.C. in Birmingham, AL during the summer of 2022. Parker closely assisted me that summer with some very complex cases which I was defending at that time. Over the course of the summer, Parker drafted 5 motions for summary judgment in my cases, and I was very impressed with his attention to detail and writing ability. I find it very uncommon for a law clerk to possess the writing ability of a seasoned attorney with a decade or more of experience, but Parker has that coveted ability. I also found that Parker's work ethic was beyond reproach as he regularly was among the first to arrive at the office and among the last to leave. Parker certainly has the ethical fiber and other intangibles which will make him an asset to our profession.

If I can answer any questions on Parker's behalf, please do not hesitate to contact me. Again, it gives me great pleasure to recommend Parker Jennings for the aforementioned position.

Sincerely,

Jarrod Bazemore

Jarrod B. Bazemore

JBB:jgh

June 20, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I write today to give my support for Parker Jennings's application to serve as your law clerk during the 2024-25 term. I was Parker's legal writing professor for both the fall and spring semesters of his first year. Parker made great progress in terms of his writing during my class. His legal research skills were excellent, and he brought a diligent and hard-working effort to all assignments.

In our legal writing program, students prepare several drafts of traditional office memoranda as well as an appellate brief. We meet individually with the students several times over the course of the year to discuss their work. These conferences provide me with insight into a student's personality and allow me to see how the student works in a one-on-one setting. Meeting with Parker was always enjoyable and productive. He was prepared and asked thoughtful questions. Most importantly, Parker worked well with constructive criticism. He viewed our conferences as opportunities to learn and grow as a writer, a view that is increasingly rare among law students. These qualities should foster a good working relationship in chambers.

Additionally, since his first year, Parker has focused on developing his writing skills. He is the Lead Articles Editor for the Alabama Law and Psychology Review and is a member of the Moot Court Board. The appellate brief that Parker prepared for the intra-school moot court competition scored very well, and the faculty selected Parker for the Duberstein Bankruptcy Moot Court Team, one of the most prestigious moot court competitions. Although Parker was a very capable legal writer in his first year, he has shown considerable growth in this area.

After his first year of law school, Parker served as a judicial extern with the Honorable L. Scott Coogler, Chief Judge of the United States District Court for the Northern District of Alabama. His combination of writing skills and clerkship experience should make him an immediate asset in chambers.

In addition to his academic success, Parker is a remarkably collegial person. This has earned him the respect of both his peers and the law school faculty. A clerkship in your chambers would be a rewarding professional experience for him, and I know that he would approach the opportunity with the same thoughtful intelligence that has garnered him so much success already. I hope you will give Parker's application serious consideration.

Sincerely,

Cameron W. Fogle

Cameron Fogle - cfogle@law.ua.edu

PARKER JENNINGS

380 14 Pl E apt #313 ● Tuscaloosa, AL 35401 ● 870-270-2302 ● pgjennings@crimson.ua.edu

WRITING SAMPLE

I drafted the attached writing sample for The University of Alabama School of Law 2L Moot Court Competition. The assignment required drafting an appellate brief with a partner on two issues—one for each partner. I independently conducted all of the research pertaining to my section of the brief and included only those sections of the brief that I drafted exclusively. By the assignment's instructions, the complete brief could not exceed thirty pages.

ARGUMENT

Federal Rule of Appellate Procedure 4(c), commonly known as the Prison Mailbox Rule, provides that an inmate's notice of appeal is considered timely if it is deposited in the institution's legal mail system on or before the filing deadline and satisfies the requirements in Sections 4(c)(1)(A) or (B). Fed. R. App. P. 4(c). This Rule recognizes that prisoners face unique difficulties when they are forced to rely on the prison mail system to file their own notices of appeal. Rule 4(c) combats these concerns by considering a notice filed when it is given to prison authorities. When a prisoner meets the requirements of Rule 4(c) in filing a notice of appeal, the notice is considered timely. *See United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004).

This Court should affirm the Thirteenth Circuit's holding. The Thirteenth Circuit properly held that Rule 4(c) is not strictly limited to *pro se* litigants. R. at 15. The court reasoned that the plain language of Rule 4(c) does not differentiate between *pro se* and represented prisoners and noted that its holding is consistent with the common law Prison Mailbox Rule. R. at 14–15.

I. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT RULE 4(c) IS NOT STRICTLY LIMITED TO PRISONERS PROCEEDING *PRO SE*.

The first issue for the Court is whether Federal Rule of Appellate Procedure Rule 4(c), commonly known as the Prison Mailbox Rule, is strictly limited to *pro se* litigants. The Prison Mailbox Rule was originally set forth by the Court in *Houston*. *Houston v. Lack*, 487 U.S. 266 (1988). The Court held that a *pro se* prisoner's habeas petition was considered filed at the time it was given to prison authorities. *Id.* at 276. The Court reasoned that a *pro se* prisoner cannot take the steps available to other litigants and are without counsel to ensure that their notice is timely filed. *Id.* at 270–71. In 1993, Federal Rule of Appellate Procedure 4 was amended to include the Prison Mailbox Rule for notices of appeal in Section (c). *Id.* at 931; *see also* Fed. R. App. P. 4(c)

(Notes of Advisory Committee on Rules—1993 Amendment). Rule 4(c) provides that a notice of appeal filed by "an inmate confined" in "an institution [with] a system designed for legal mail" is timely if it is "deposited in the institution's internal mail system on or before the last day for filing." Fed. R. App. P. 4(c). The appeal must also satisfy the requirements of 4(c)(1)(A) or (B). *Id.*

This Court has not directly decided whether Rule 4(c) applies to prisoners represented by counsel; however, this Court has recognized the difficulties that prisoners filing their own notices face in *Houston*. 487 U.S. 266, 270–71 (1988). The circuits are currently split on whether the common law Prison Mailbox Rule set forth in *Houston* applies to represented prisoners; however, the circuits are seemingly not split on whether Rule 4(c) applies to represented prisoners. Nico Corti, *The Prison Mailbox Rule: Can Represented Incarcerated Litigants Benefit?*, 91 FORDHAM L. REV. 919, 936 (2022).

The common law Prison Mailbox Rule and Rule 4(c) are sometimes conflated by courts. *See id.* Rule 4(c) was promulgated to codify the common law Prison Mailbox Rule, but this Court gives effect to the plain language of Rules. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982). The Seventh Circuit properly noted that the common law Prison Mailbox Rule is no longer controlling for inmate appeals—Rule 4(c) applies. *Craig*, 368 F.3d at 740 (rejecting the argument that the Prison Mailbox Rule only applies to unrepresented prisoners because Rule 4(c) is controlling, not *Houston*); *Houston*, 487 U.S. 266 (1988).

Rule 4(c) has not been applied in any circuit cases that have declined to extend the Prison Mailbox Rule to represented prisoners. Instead, those cases were decided on the common law Prison Mailbox Rule. *See Cretacci v. Call*, 988 F.3d 860, 867 (6th Cir. 2021) (explaining the circuit split). Rule 4(c) governs when an inmate's notice of appeal is filed. Fed. R. App. P. 4(c).

Therefore, Rule 4(c) is controlling, not the common law Prison Mailbox Rule set forth in *Houston*. *Craig*, 368 F.3d 738, 740; *Houston*, 487 U.S. 266.

The Thirteenth Circuit agreed with the Fourth and Seventh Circuits in holding that the Prison Mailbox Rule may apply to prisoners represented by counsel. *United States v. Moore,* 24 F.3d 624 (4th Cir. 1994); *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004). The Fourth Circuit held that represented prisoners filing their own notices fit within the rationale of *Houston*, reasoning that represented prisoners filing their own notices may face difficulties similar to *pro se* prisoners. *Moore*, 24 F.3d at 625. The Seventh Circuit held that the plain language of Rule 4(c) clearly does not limit its application to *pro se* litigants. *Craig*, 368 F.3d at 740. The Second, Sixth, and Tenth Circuits purport to agree. *Amaker v. Schiraldi,* 812 Fed. Appx. 21, 23 (2nd Cir. 2020) (stating that Rule 4(c) governs "confined inmates filing appeals."); *Cretacci v. Call*, 988 F.3d at 872 ("Rule 4 [] accommodated the challenges an inmate faces in filing a notice of appeal." (Readler J., concurring)); *Price v. Philpot,* 420 F.3d 1158, 1164–65 (10th Cir. 2005) (stating that Rule 4(c)(1) and other versions of the Prison Mailbox Rule show a "clear desire" for consistency for "uniform rule to all inmate filings.").

Other circuits have declined to extend the common law Prison Mailbox Rule to prisoners represented by counsel, not Rule 4(c). *See, e.g.*, *Cretacci,* 988 F.3d at 867. Those circuits, relying on *Houston*, commonly reason that prisoners represented by counsel are not dependent upon the prison mail system because they may rely on their attorneys to timely file documents. *See id.* (explaining the circuit split); *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002); *United States v. Camilo*, 686 F. App'x 645, 646 (11th Cir. 2017); *Burgs v. Johnson County*, 79 F.3d 701, 702 (8th Cir. 1996); *Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003); *United States v. Rodriguez-Aguirre*, 30 App'x 803, 805 (10th Cir. 2002).

The facts, which meet all requirements of Rule 4(c), are undisputed. R. at 11. Riga Correctional Institution is "an institution [with] a system designed for legal mail." R. at 11. It is also undisputed that Petrosian is "an inmate confined there" and properly deposited the notice of appeal in the institution's internal mail system in compliance with Rule 4(c)(1) with prepaid postage to satisfy Rule 4(c)(1)(A)(ii). Fed. R. App. P. 4(c)(1); R. at 11. Instead, the issue is whether Rule 4(c) may apply to a represented prisoner.

This Court should adopt the Thirteenth Circuit's reasoning that Rule 4(c) is not strictly limited to prisoners proceeding *pro se*. First, the plain language of Rule 4(c)(1) does not differentiate between *pro se* and represented prisoners and instead applies to "all inmates." Also, applying Rule 4(c) in this case fits squarely in the rationales set forth in *Houston* and circuits declining to apply the Prison Mailbox Rule to prisoners represented by counsel.

A. The plain language of Rule 4(c) does not strictly limit its application to *pro se* litigants.

"In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review . . . ." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406–07 (2010) (citing 28 U.S.C. § 2072(a)). This Court does not have the power to disregard procedural rules and must interpret rules based on their plain language. *Carlisle v. United States*, 517 U.S. 416, 416 (1996) (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254–55 (1988)); *U.S. v. Ceballos-Martinez*, 387 F.3d 1140, 1144 (10th Cir. 2004) (citing *Watt v. Alaska*, 451 U.S. 259, 265 (1981)). This Court also does not have the discretion to contract its jurisdiction by altering mandatory, jurisdictional filing deadlines. *See Houston*, 487 U.S. at 280 (Scalia, J., dissenting). Nor may this Court "rewrite the Rules by judicial interpretation." *Harris v. Nelson*, 394 U.S. at 298. When a Rule is based upon a common law

rule and explicitly alters the rule by plain language, this Court applies the Rule according to its plain language. *See Samantar v. Yousuf*, 560 U.S. 305, 320 (2010).

The plain language of Federal Rule of Appellate Procedure Rule 4(c) applies to all confined inmates, whether or not represented. First, the text of Rule 4(c) is unambiguous as to whom it applies. Also, as evidence of the drafters' intention, other procedural rules differentiate between represented and unrepresented litigants while Rule 4(c) does not. Further, legislative history supports not limiting Rule 4(c) to unrepresented litigants.

i. The text of Rule 4(c) is unambiguous as to not strictly limit its application to *pro se* litigants.

This Court's interpretation of a Federal Rule begins and ends with the text if the text is unambiguous. *See Pavelic & Leflore v. Marvel Ent. Group*, 493 U.S. 120, 123 (1989). Where a Rule's language is plain and unambiguous, this Court must apply the Rule according to its terms. *See id.*; *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

Rule 4(c) applies to all inmates confined in an institution with a system designed for legal mail. Fed. R. App. P. 4(c)(1). There is no text in Rule 4(c)(1) to suggest that its application is limited to unrepresented prisoners:

> (1) If an institution has a system designed for legal mail, *an inmate confined there* must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

Id. (emphasis added).

The Seventh Circuit evaluated the plain language of Rule 4(c) and reached the same conclusion. *Craig*, 368 F.3d at 740 (applying Rule 4(c) to a represented prisoner). In *Craig*, the Seventh Circuit reasoned that they would be required to write in "unrepresented" for Rule 4(c) to

only apply to unrepresented prisoners and that Rule 4(c) is not written as "incoherent nor absurd." *Id.* It would be wholly unreasonable for anyone to interpret "an inmate confined" to mean only *pro se* inmates.

The plain language of Rule 4(c) makes no distinction between unrepresented and represented prisoners and confers its benefit on "an inmate confined" in "an institution" with "a system designed for legal mail" that complies with other requirements in Rule 4(c). Fed. R. App. P. 4(c)(1). Neither party disputes that Petrosian was an inmate confined in an institution with a system designed for legal mail and complied with all other requirements in Rule 4(c). Consequently, Rule 4(c)'s plain language grants Petrosian its benefit.

ii. Other Federal Rules of Appellate Procedure make the distinction between represented and unrepresented litigants while Rule 4(c) does not.

When interpreting the Federal Rules, this Court uses conventional methods of statutory interpretation. *See Harris*, 394 U.S. at 298. This Court must presume that Congress acts "intentionally and purposely" where particular language is included in one section of the Rules but omitted in another. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). When a Rule declines to use language that is used in another section, this Court presumes that Congress would have expressly used that language if they intended. *See Russello*, 464 U.S. 16, 23.

The Federal Rules of Appellate Procedure make the distinction between represented and unrepresented litigants in Rule 25(a)(2)(B). Fed. R. App. P. 25(a)(2)(B). The distinction is explicitly made with different filing procedures for "represented" and "unrepresented" litigants in 25(a)(2)(B)(i) and (ii). *Id.* The same distinction is not made in Rule 4(c)(1), triggering the presumption that Congress acted "intentionally and purposely" in choosing to not include the

distinction between represented and unrepresented litigants in Rule 4(c). *See Barnhart*, 534 U.S. at 452; Fed. R. App. P. 4(c).

Further, the Prison Mailbox Rule is reiterated in Rule 25(a)(2)(A)(iii). Fed. R. App. P. 25(a)(2)(A)(iii) ("A paper [mailed] by *an inmate* is timely if it is deposited in the institution's internal mail system on or before the last day for filing . . . ." (emphasis added)). Just one section before making the distinction between represented and unrepresented litigants, Congress chose not to do so with regard to inmate filings. This further bolsters the presumption that Congress did not intend to make a distinction between represented and unrepresented prisoners in Rule 4(c).

This Court must presume that the drafters did not intend Rule 4(c) to only apply to *pro se* litigants because they omitted language that was used to make the distinction in another section of the same set of rules. *See Barnhart*, 534 U.S. 438, 452; Fed. R. App. P. 4(c)(1); Fed. R. App. P. 25(a)(2)(B). This shows that Congress knew how to make the distinction between represented and unrepresented litigants and chose not to in drafting Rule 4(c) or Rule 25(a)(2)(A)(iii). Therefore, Congressional intent also compels the Court to apply the plain language of Rule 4(c) to not be strictly limited to *pro se* litigants.

iii. <u>The legislative history of Rule 4(c) also supports not strictly limiting Rule 4(c) to *pro se* litigants.</u>

This Court looks to legislative history prior to the enactment of a Rule to ascertain its intended meaning. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521–22 (1989). Congressional intent is shown when one version of a rule is proposed and explicitly rejected. *See id.*

The drafters of Rule 4(c) acted intentionally to not limit Rule 4(c) to *pro se* prisoners. ADVISORY COMM. ON FED. R. APP. P., MINUTES OF THE APRIL 17, 1991 MEETING OF THE COMMITTEE ON FED. R. APP. P., at 26. The minutes of the 1991 Advisory Committee meeting

detail the early considerations of codifying the Prison Mailbox Rule. The minutes acknowledge that the prior draft of Rule 4(c) limited its application to *pro se* litigants, but the new draft explicitly excluded that limitation because "the Supreme Court's rule does not." *Id.* (referencing Supreme Court Rule 29.2 which reiterates the Prison Mailbox Rule); Mario Ramirez, *Untangling the Prison Mailbox Rules*, 89 U. CHI. L. REV. 1331, 1342 (2022). While the 1993 Amendment Notes state that Rule 4(c) codifies the decision in *Houston*, the drafters explicitly extended *Houston* to represented litigants by rejecting the 1991 draft. *See* MINUTES OF THE APRIL 17, 1991 MEETING OF THE COMMITTEE ON FED. R. APP. P., at 26. The unanimously approved language in the 1991 draft applied to "any inmate confined in an institution." *Id.* at 27.

Further, Professor Catherine Struve's memo to the Advisory Committee meeting in the summer of 2013 confirms that the drafters intended Rule 4(c) to apply to all prisoners: "Participants in the summer 2013 discussions were in agreement that the inmate-filing rule should apply to items filed by the inmate, whether or not the inmate is represented." Memorandum from Catherine T. Struve, U.S. Rep., to Advisory Comm. on App. Rules at 99 (Sept. 10, 2013). The Committee found no realistic circumstances where an attorney representing an inmate could abuse this rule. *Id.* The 2013 memo goes on to recognize that the Committee explicitly rejected the original (1991) draft in 1993 that would have limited Rule 4(c) to unrepresented litigants. *Id.* Professor Struve stated that she did not find any decision that held Rule 4(c) is inapplicable to represented inmates. *Id.* at 113–14. *But see Burgs v. Johnson Cnty*, 79 F.3d 701, 702; *see also* Nico Corti, *The Prison Mailbox Rule: Can Represented Incarcerated Litigants Benefit?*, 91 FORDHAM L. REV. 919, 936 (2022) (stating the court in *Burgs* erroneously applied *Houston* when Rule 4(c) applied). Therefore, the Committee had no reason to amend Rule 4(c) because courts declining to extend the Prison Mailbox Rule to represented prisoners

were evaluating the common law rule, not Rule 4(c). Memorandum from Catherine T. Struve, U.S. Rep., to Advisory Comm. on App. Rules at 113–14 (Sept. 10, 2013).

The drafters of Rule 4(c) explicitly rejected limiting the rule to *pro se* litigants in 1993 and retained the same language despite opportunities to amend. Thus, the legislative history shows that the drafters intended Rule 4(c) to apply to all prisoners "whether or not the inmate is represented." *Id.* The drafters had ample time and opportunity to amend Rule 4(c) when they knew it was being applied to represented prisoners, and they chose not to. Therefore, this Court should apply Rule 4(c) to all inmates as the plain language suggests and the drafters intended.

Shortly, Rule 4(c) is controlling when considering whether an inmate's notice of appeal is timely filed. The plain language of Rule 4(c) clearly does not make a distinction between represented and unrepresented litigants. The plain language is further bolstered by other provisions of the Federal Rules of Appellate Procedure and the legislative history of Rule 4(c). It is undisputed that Petrosian is an inmate and complied with all requirements in Rule 4(c). Therefore, Petrosian should receive the benefit of Rule 4(c).

B. *Houston* and circuits declining to extend the Prison Mailbox Rule to represented prisoners do not strictly limit the Prison Mailbox Rule to unrepresented litigants.

This Court has a long line of cases providing flexibility to filing deadlines for imprisoned litigants filing their own documents. *See Fallen v. U.S.*, 378 U.S. 139, 144–45 (1964) (Stewart, J., concurring); *Houston*, 487 U.S. at 269–70 (applying the concurrence analysis in *Fallen*). This Court has stretched the plain language of mandatory, jurisdictional Rules in favor of fairness principles. *Houston*, 487 U.S. at 277 (Scalia, J., dissenting). Principles of fairness are generally stronger with respect to criminal proceedings as a person's freedom is often at stake. *See Fallen*, 378 U.S. at 142 (stating that criminal procedural rules are "intended to provide a just

determination of every criminal proceeding"). Providing flexibility for filing deadlines in the context of a civil action for damages but not for criminal proceedings—when someone's freedom is at stake—would be "perverse." *Moore*, 24 F.3d at 625 (discussing *Houston* and finding "no reasonable basis for limiting [the Prison Mailbox Rule] to civil actions").

This Court should not strictly limit the common law Prison Mailbox Rule to *pro se* litigants. *First, Houston* was predicated on inmates losing control over their appeal, whether or not the inmate was represented. *Second*, Petrosian faced unique circumstances that fit within the rationale of circuits evaluating the Prison Mailbox Rule.

i. *Houston* does not strictly limit the Prison Mailbox Rule to *pro se* litigants.

Houston was predicated on fairness and the unique circumstances of imprisoned litigants. *Moore*, 24 F.3d at 625. The Prison Mailbox Rule applies where a prisoner and their attorney are unable to take steps available to other litigants to ensure that their notice of appeal is timely filed. *See, e.g.*, *Houston*, 487 U.S. at 270–71. In *Houston*, the Court did not consider that a represented prisoner may be without the aid of counsel to ensure that their notice is timely filed. *See id.*

Petrosian was without the aid of counsel and forced to rely on the prison mail system to file his notice of appeal. Similar to the prisoner in *Houston*, Petrosian could not rely on his attorney to ensure his notice was timely filed, and as a result, he was dependent upon the prison mail system. Although Petrosian was represented by counsel at the time of filing his notice, his counsel was not available to ensure that his notice was timely filed. After days of searching for a new attorney to no avail, Petrosian retained Krush two days before the filing deadline. However, Krush was out of the country and would not return before the filing deadline. She only gave guidance to Petrosian to prepare and file the notice, and he deposited the notice into the prison mail system that same day. Krush did not prepare or file the notice of appeal.

Petrosian faced the same unique circumstances as a *pro se* prisoner. He could not "personally travel to the courthouse," "entrust [his] appeal[] to the [] mail and the clerk's process," or "call[] the court." *Houston*, at 271. Petrosian also did not "have [a] lawyer[] who [could] take these precautions for [him]." *Id.* Because Petrosian could not take steps available to other litigants or rely on his attorney to aid in filing, this case fits squarely within the rationale of the common law Prison Mailbox Rule in *Houston*. *See id.*; *Moore*, 24 F.3d at 625.

ii. The common rationale among circuits supports applying the Prison Mailbox Rule in Petrosian's circumstances.

The circuits' common rationale for not applying the Prison Mailbox Rule to represented prisoners is that those prisoners may rely on their attorney to file legal documents, making them no longer dependent on the prison mail system. *See Cretacci v. Call*, 988 F.3d 860, 867 (6th Cir. 2021). In most of the circuit split cases, it was undisputed that the prisoner's attorney had the ability to prepare and file these documents; however, the Sixth and Ninth Circuits first determined whether the prisoner was actively represented. *See Cretacci v. Call*, 988 F.3d 860, 866 (6th Cir. 2021); *Stillman v. Lamarque*, 319 F.3d 1199, 1200–01 (9th Cir. 2003). When an attorney does not prepare or file documents on their client's behalf, the litigant is likely not considered to be actively represented. *See Cretacci*, 988 F.3d at 866 (citing Tenn. Code Ann. § 23-3-101(3)); *Stillman*, 319 F.3d at 1200–01.

In *Stillman*, the court evaluated whether the common law Prison Mailbox Rule applied to a prisoner's habeas petition. Stillman's counsel agreed to represent him, prepared his habeas petition, and arranged with prison officials for him to sign the document. *Stillman*, 319 F.3d at 1201. The prison authorities did not hold their promise to deliver the document back the same day, causing his attorney to file the petition after the deadline. The court held that the prisoner was not entitled to the Prison Mailbox Rule, in part, because he was not proceeding without the

aid of counsel. *Id.* The court, instead, entitled Stillman to equitable tolling. *Id.* at 1203. The court reasoned that his counsel prepared legal documents and arranged for them to be signed and filed on his behalf, constituting representation under California's definition of "practicing law." *Id.* at 1200–01.

Unlike the prisoner in *Stillman*, Petrosian acted without the aid of counsel in preparing and filing his notice of appeal. Petrosian's representation is more similar to the "passive" representation contemplated by the Fourth Circuit in *Moore*. *Moore*, 24 F.3d at 625 (stating that a prisoner attempting to file his own notice is acting "without the aid of counsel" even if he is technically "represented"). Petrosian searched for a new attorney for twelve days until reaching Krush, who agreed to represent him. R. at 8. However, Krush was out of the country and would not return until after the filing deadline. *Id.* In contrast, the prisoner's attorney in *Stillman* prepared his documents and attempted to file them. Krush was not available to prepare or file Petrosian's notice of appeal. *Id.* Instead, she only explained how to file the notice of appeal and directed him to file it immediately to meet the filing deadline. *Id.* Petrosian filed the notice that same day with no further assistance from Krush. *Id.*

Since Petrosian acted without the aid of counsel in preparing and filing his notice of appeal, most circuits would likely apply the Prison Mailbox Rule to Petrosian. The circuits reason that the Prison Mailbox Rule only applies to unrepresented prisoners because they are forced to rely on the prison mail system without the aid of counsel. Petrosian was technically represented, but he was forced to rely on the prison mail system without the aid of counsel. Therefore, this Court should not strictly limit the Prison Mailbox Rule to *pro se* prisoners.

Although the applicable rule is 4(c), *Houston* and circuits declining to extend the Prison Mailbox Rule do not strictly limit the Prison Mailbox Rule to *pro se* litigants. The common

rationale of courts not applying the Prison Mailbox Rule to represented prisoners is that a represented prisoner may rely on counsel to ensure that their notice is timely filed. Although Petrosian was technically represented, his counsel was not available to ensure that his notice was timely filed. Petrosian's circumstance rendered him dependent on the prison mail system without the aid of counsel.

In short, the plain language of Rule 4(c) applies to all inmates and Petrosian's circumstances fit squarely within the rationale of *Houston* and circuits declining to extend the Prison Mailbox Rule to represented prisoners. Therefore, this Court should affirm the Thirteenth Circuit's ruling that Rule 4(c) is not strictly limited to *pro se* litigants.

Applicant Details

First Name	**Victoria**
Last Name	**Jones**
Citizenship Status	**U. S. Citizen**
Email Address	**victoria.jones@law.ua.edu**
Address	**Address** Street **2311 5th St E** City **Tuscaloosa** State/Territory **Alabama** Zip **35404** Country **United States**
Contact Phone Number	**3072994834**

Applicant Education

BA/BS From	**University of Colorado-Colorado Springs**
Date of BA/BS	**May 2021**
JD/LLB From	**The University of Alabama School of Law** **http://www.law.ua.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**50%**
Law Review/Journal	**Yes**
Journal(s)	**Journal of the Legal Profession**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Grove, Tara
tgrove@law.utexas.edu
Gold, Russell
rgold@ua.edu
205-348-1139
Krotoszynski, Ronald
rkrotoszynski@law.ua.edu

References

Julie A. Hill
Alton C. and Cecile Cunningham Craig Professor of Law
University of Alabama School of Law
205-348-5973
jhill@law.ua.edu

David Rains
General Counsel
Randall-Reilly
205-349-2990
DavidRains@randallreilly.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 18, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am a student at the University of Alabama School of Law. I am writing to express my interest in your chambers for the 2024-2025 term. I am an Articles Editor on the Journal of the Legal Profession and interned for Chief Judge L. Scott Coogler over the previous summer.

My summer jobs have provided me with experience in legal writing in a variety of practice areas, including transactional law and litigation, and strengthened my research skills. As a research assistant, I have become well versed in using Westlaw and Lexis to identify relevant laws and articles to resolve issues and stay up to date on emerging legal developments. In my in-house counsel position at Randall-Reilly, I gained experience in legal writing by drafting contracts for employees, vendors, and customers. As a summer clerk at Fidelity National Title Insurance, I have strengthened my research abilities by completing research projects covering different states and a variety of legal issues. My research and writing abilities help me multitask and stay on top of heavy workloads, and will make me an effective Articles Editor on the Journal of the Legal Profession this fall. In my law clerk internship with Judge Coogler, I practiced applying case law to real cases and legal writing to resolve issues. This experience solidified my interest in clerking after graduating from law school. These abilities will enable me to meaningfully contribute to your chambers.

I have attached my resume and most recent transcript. Letters of recommendation from Professor Gold, Professor Grove, and Professor Krotoszynski are enclosed as well. I have also included a copy of my seminar paper, for which I conducted empirical research. Thank you for your consideration.

Sincerely,

Victoria Jones

VICTORIA JONES

2311 5th St E
Tuscaloosa, AL 35404
307-299-4834
Victoria.jones@law.ua.edu

EDUCATION

The University of Alabama School of Law Tuscaloosa, AL
Juris Doctor Candidate, May 2024

- GPA: 3.30
- *Journal of the Legal Profession*, Articles Editor
- If/When/How, Secretary
- Latinx Law Student Association, Secretary
- Business Law Society, Member
- Federalist Society, Member
- Student Animal Legal Defense Fund, Member
- First Generation Lawyer's Association, Member

University of Colorado at Colorado Springs Colorado Springs, CO
Bachelor of Science, *magna cum laude*, in Marketing, May 2021

- GPA: 3.71
- Honors: National Society of Leadership and Success; Dean's List; President's List
- Pre-Law Society

EXPERIENCE

Fidelity National Title Insurance Omaha, NE
In-House Counsel Summer Clerk, May-July 2023

- Completed research projects to assist assigning attorneys with coverage claims
- Made coverage determinations on live claims from title insurance customers

Chief Judge L. Scott Coogler, Northern District of Alabama Tuscaloosa, AL
Law Clerk, July-August 2022

- Observed courtroom proceedings
- Drafted opinion on a motion to compel arbitration

Randall-Reilly Tuscaloosa, AL
In-House Counsel Summer Extern, May-July 2022

- Reviewed contracts with independent contractors, sales vendors, and customers
- Researched and drafted memoranda on emerging contract law issues
- Submitted recommendations to counsel and customers under attorney's supervision

COMMUNITY SERVICE

Natrona County High school, Volunteer Speech and Debate Judge
Beagle Freedom Project, Volunteer
Tuscaloosa Metro Animal Shelter, Volunteer
Habitat for Humanity Wills Clinic, Volunteer

ADDITIONAL INTERESTS

Ballroom dancing, volunteering with animals, traveling to national parks

June 18, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am happy to recommend Victoria Jones for a judicial clerkship. Victoria was a strong student in my Civil Procedure class in the fall 2021 semester, when I taught at the University of Alabama School of Law. I am also impressed by Victoria's engagement with the Alabama Law community, as illustrated by her involvement with several organizations, such as the Journal of the Legal Profession and as the Secretary of If/When/How. I believe that Victoria will make a fine law clerk, and I highly recommend her.

Victoria's exam in Civil Procedure demonstrates her analytic ability. She did a terrific job with issues of personal jurisdiction and the plausibility pleading standard from Bell Atlantic Corp. v. Twombly (2007) and Ashcroft v. Iqbal (2009). Although Victoria did not perform as well on the exam as I might have expected (she earned a B+), I feel confident that she has a strong understanding of the law of jurisdiction and procedure.

Victoria further showed her legal skills and fascination with the law through her engagement in and outside of class. During the fall 2021 semester, law schools continued to deal with the effects of the COVID-19 pandemic, and students were required to wear masks much of the fall semester. But Victoria did a great job participating even in this complex environment. In class, I use a Socratic method of teaching; I call on students at random (an approach I continued to use in this new teaching environment). Victoria was consistently ready to answer questions. She was also a frequent participant during office hours. We had many terrific conversations—about topics ranging from the Erie doctrine and res judicata to more general questions about the Supreme Court's approach to statutory interpretation. Victoria was particularly curious about the Court's increasing interest in textualism. Her fascination with the law will undoubtedly make her a strong addition to any judicial chambers.

If I can be of any more assistance, please do not hesitate to contact me, either by phone (w: 512-232-1363; c: 703-786-9731) or email (tgrove@law.utexas.edu). I wish you the best of luck with your selection process.

Sincerely,

Tara Leigh Grove
Vinson & Elkins Chair in Law
University of Texas School of Law

June 18, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I write to recommend Victoria Jones for a clerkship in your chambers. Victoria was one of the best students in my Criminal Law class during her first year of law school. Victoria received an A- in the Criminal Law course—quite an accomplishment in a class with a 3.2 grading mean. Every time I have called on her in either of my classes, Victoria has been incredibly well prepared. She had seemingly thought through all the material and each question that I might pose. Victoria also wrote an excellent exam in my Criminal Law class that was substantively thorough and clearly written and organized. She is particularly good at carefully analyzing each piece of a statute—a skill that I saw on display both in the classroom and in her final exam.

My Criminal Law course focuses heavily on statutory interpretation and analysis, so I feel comfortable saying that Victoria's ability to interpret a statute and work carefully through complex legal analysis exceeds that of most of the students I have taught in a decade of teaching. Unlike in most first-year courses, my Criminal Law students rarely read judicial opinions. They instead read extensive fact patterns and numerous statutes. We then spend most of our class time parsing statutes and determining whether the government could satisfy its burden of proof on every element of each statute. Victoria was always incredibly well prepared for class. When I called on her, it was clear that Victoria had already worked carefully and methodically through each of the statutes and had considered in detail how each of the specific facts might support or undermine potential charges. Her answers were succinct yet comprehensive.

Victoria did an excellent job on the final exam in my Criminal Law class. Among the many strengths of her exam, her careful parsing of the statutory text particularly stands out. Because I agree with the criticism that Justice Scalia levied about the first-year law school curriculum being too grounded in common law and not enough in statutes, I teach a course and give an exam that is deeply grounded in statutes. I provide numerous statutes that can apply to each question, and students must work through them in detail.

One particularly impressive piece of Victoria's statutory analysis arose on the homicide question where I gave students a felony murder rule statute that included examples of inherently dangerous felonies followed by a residual clause. Many students ignored the examples of those inherently dangerous felonies. By contrast, Victoria's answer deployed the ejusdem generis canon quite effectively. She recognized that theft and rape committed by force or threat of force both involve force or threat of force applied directly to someone's person. She then explained that transporting drugs—the charge at issue in the exam fact pattern—does not involve similar force or threat of force applied directly to someone's person. It thus could not be a predicate felony within the meaning of that statute. Few students handled that statutory provision well, which is why Victoria's clear analysis stood out so much. Nonetheless, I was not surprised to see Victoria handle those statutes so well. She was similarly careful and effective at breaking down statutes and applying the facts when I called on her in class.

The first question of my final exam last Fall involved a minor in possession of a short-barreled rifle, and it required a lot of careful work with the specific language of various statutes to reach that conclusion. Victoria had one of the very highest scores on that question. To begin with, she recognized that I had used statutory language that made the length of the firearm a strict liability element; she quoted that statutory language to prove that point in her response. My students had not seen many strict liability elements all semester, but Victoria handled the strict liability language easily and persuasively. The relevant statute also used two different types of measurements that could make a gun short barreled—the length from bolt face to muzzle or the total length. There too, Victoria handled that statutory structure with ease despite the time pressure. She recognized that the two methods for measuring the rifle were separated by an "or," and she even emphasized the word "or" in her exam answer.

In addition to the strong substance of Victoria's final exam, her answer was extremely easy to read and grade because it was very well organized and clearly written. Under the time pressure of an exam, many students do not deliver very clear or organized work product, especially in the Fall of their first year of law school. Victoria's exam used headings and subheadings throughout to clearly separate each issue that she addressed. She used paragraph structure very effectively, ensuring that each paragraph addressed only a single point. Within that very clear framework, Victoria's writing was itself quite straightforward, clear, and concise. She very effectively triaged the numerous issues on the exam—dedicating most of her time to the closest questions and resolving the easy ones sometimes as quickly as in a single clear sentence. In so doing, Victoria showed excellent judgment and ability to sift through numerous arguments—a skill that I found quite important when I was a law clerk.

Victoria cares about precision in language—a theme that runs through her success in my class, her interest in contract work and contract law, and her interest in numerous statutory and business law courses in the law school curriculum. Victoria's favorite class during her first year of law school was Contracts; she likes the idea that effective contract drafting requires writing clearly enough that even non-lawyers can understand and comply with the language. I was very excited to learn that Victoria spent part of last summer working in-house doing contract review and researching contract law issues because that work builds so wonderfully on her interests and her skills. I am excited about the careful attention to language and organization that Victoria will bring to a clerkship and to the practice of law.

Victoria has been and continues to be a wonderful member of our law school community and our surrounding community. She

Russell Gold - rgold@ua.edu - 205-348-1139

has been active in several student organizations, and she volunteers at a local animal shelter.

It was a pleasure to have Victoria Jones in my class, and I am delighted to have this opportunity to recommend her. She will make an excellent law clerk. Victoria is a clear analytical thinker and writer; she is also an extremely nice and engaging person who is a pleasure to talk with. If I can provide you with any additional information, please feel free to contact me at 205-348-1139 or rgold@law.ua.edu.

Very truly yours,

Russell M. Gold
Associate Professor of Law
University of Alabama School of Law

VICTORIA JONES

2311 5th St E
Tuscaloosa, AL 35404
307-299-4834
Victoria.jones@law.ua.edu

WRITING SAMPLE

The attached writing sample is the Seminar Paper I prepared for an Advanced Contracts Seminar in Spring of 2023. For my paper, I chose to conduct empirical research into mandatory arbitration, particularly its use in work contracts with low-wage employees. I was interested to see what people's understanding of arbitration was. This work has been reviewed by my seminar professor.

EMPLOYEE KNOWLEDGE OF ARBITRATION: AN EMPIRICAL ANALYSIS

Victoria Jones

Part I: Introduction

Modern contract law has come a long way from bartering in the town square over how many pieces of cheese your chicken was worth. Heated negotiations back and forth between two parties have largely been replaced in modern society by contracts of adhesion – that is, an agreement drafted by one party (or their legal team) and presented to the other on a take-it-or-leave-it basis.[1] Parties no longer negotiate terms or attempt to reach a common understanding about the contract. Rather, they usually check a box or click a button and become bound to a set of terms they almost certainly did not read.[2]

Currently, courts widely enforce contracts of adhesion, no matter how one-sided their terms appear to be.[3] They expect consumers and employees to have read the terms of any contract they signed or agreed to; if they cannot read, courts expect that the consumer or employee will have someone read the terms to them.[4] This is called the duty to read.[5] While contracts of adhesion have given rise to the duty to read, it has been argued that even if the average person did read the terms of the contracts, they would either not be able to understand the terms or they would not fully comprehend the consequences of certain provisions.[6]

Criticisms of the duty to read have abounded in legal scholarship, but this paper is concerned with a narrow issue regarding one specific and common provision within adhesive contracts: mandatory arbitration in employment contracts.

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[1] 1 Corbin on Contracts Desk Edition § 24.18 (2021).
[2] *Id.*
[3] *Id.*
[4] Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).
[5] *Id.*
[6] *Id.*

Arbitration has become a preferred method of dispute resolution in the United States.[7] Proponents of arbitration claim it is faster, cheaper, and less cumbersome than traditional litigation.[8] They champion arbitration as the solution to a broken judicial system for people who may not otherwise have the ability to pursue meritorious claims.[9] In theory, there were many benefits to arbitration that would make it more accessible than litigation. It is true that litigation poses many barriers to average American people.[10] However, in practice, arbitration has made bringing claims even more challenging. Some of its perceived benefits cut against unsophisticated parties, such as low-wage employees. With the widespread use of adhesive contracts that often include arbitration provisions and the enthusiastic support of the courts in enforcing them, mandatory arbitration has become increasingly prevalent.

This paper will examine how much people actually know about the costs and benefits of arbitration. Specifically, I am interested to see if people understand what rights and privileges they are giving up when they consent to be subject to an arbitration provision. Going into the study, I hypothesized that even if people did read the terms they were subject to, they would not be aware of the effects arbitration has on the outcomes of cases.

Part II of this paper will examine a brief history of arbitration and discuss key statutes and cases that support its use and enforcement. This leads us to Part III, which explains the central issue of the paper: the disparity between the expected benefits of mandatory arbitration and the reality of how oppressive it is in practice. To research employee understanding of this issue, a survey was drafted on Qualtrics and distributed through Positly. The methodology used

[7] Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 10.
[8] *Id.* at 3.
[9] *Id.*
[10] *Id.* at 3, 4.

and analysis of the results is discussed in Part IV. The survey was designed to test users' general knowledge of arbitration, their perceptions of the effects of arbitration, and understanding of their rights when they were subject to an arbitration clause.

Part II: Background

In order to understand how we arrived at broad use of arbitration and enforcement of mandatory arbitration agreements, it is important to observe how arbitration has developed in the United States and the role it plays in dispute resolution today. The federal statute governing arbitration agreements is the Federal Arbitration Act, which is discussed below. We will then look at two groundbreaking cases that drastically affected the use and enforcement of arbitration clauses in contracts of adhesion: *Concepcion* and *Epic Systems*.

A. The Federal Arbitration Act

Prior to 1925, courts generally disfavored arbitration as a means to settle disputes; it was sometimes recognized, but not preferred.[11] Arbitrators' authority was limited to specific issues, such as bankruptcy or admiralty law, and courts could (and did) freely choose not to bind parties to an agreement to arbitrate.[12] Due to mounting judicial hostility towards arbitration, Congress enacted the Federal Arbitration Act (FAA) in 1925.[13]

The FAA was designed to ensure that courts enforced arbitration agreements the same as other contracts. Congress required courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. Importantly, Congress directed courts to treat arbitration agreements as "valid, irrevocable, and

[11] Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).
[12] DANIEL CENTNER AND MEGAN FORD, A BRIEF PRIMER ON THE HISTORY OF ARBITRATION, 2006.
[13] 9 U.S.C.S. § 2.

enforceable." This was meant to place arbitration agreements on the same footing as other contracts and ensure they were enforced against parties.

Over time, as the jurisprudence developed, it became clear that arbitrators had much more power than before. Federal courts were encouraged to interpret the FAA liberally, which resulted in arbitrators getting broad authority. For example, arbitrators could determine the validity of contracts at issue that had arbitration clauses. They could also determine whether a dispute fell within their jurisdiction to arbitrate in the first place. States did attempt to curb the reach of the FAA with their own legislation and courts, but these efforts were repeatedly struck down. Since laws that attempted to limit the scope of the FAA were held to be unenforceable, the use of arbitration became progressively more prevalent.

B. Concepcion:

Prior to the *Concepcion* case, state courts could refuse to enforce arbitration provisions if they felt that doing so was unconscionable.[14] In weighing a decision, courts could look to a number of factors, such as the bargaining power of the parties, the amount of individual versus aggregate claims, and whether the result of enforcing the arbitration agreement was overly harsh or one-sided.[15] If the court found that the overall result of the balancing test was that enforcing the arbitration agreement was unconscionable, it could simply refuse to hold the parties to the agreement and allow the claims to proceed in the judicial system.[16]

It is important to note that prior to *Concepcion*, this concept was the law in California (where the case originated). The state had enacted the Discover Bank Rule, which stated that class action waivers in consumer contracts of adhesion were unconscionable in cases where a

[14] Discover Bank v. Superior Court, 36 Cal. 4th 148, 153 (2005).
[15] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).
[16] *Discover Bank*, 36 Cal. 4th at 153.

party with superior bargaining power was alleged to have cheated large numbers of consumers out of individually small sums of money.[17] The state of California also reserved the ability to refuse to enforce any arbitration agreement or class action waiver if the court found that public policy weighed against upholding the agreement.[18] In fact, the FAA was subject to similar unconscionability standards in other states.[19]

The lower courts ruled in favor of the plaintiffs.[20] They found that the FAA did not preempt the Discover Bank Rule because all contracts were subject to review for unconscionability; the rule was merely a refinement of this standard, so arbitration agreements were treated the same way as other contracts.[21] Importantly, the FAA itself has a savings clause that states arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[22] Many state courts believed (and federal appellate courts agreed) that the savings clause allowed the FAA and state unconscionability doctrines to coexist without preemption issues.[23]

However, the Supreme Court disagreed with this interpretation. In a decision written by Justice Scalia, the Court said the FAA had clear and simple objectives; to ensure that agreements to arbitrate were respected and enforced by the courts.[24] The savings clause, Justice Scalia wrote, did not attempt to preserve states' rights to interfere with these objectives.[25] In overruling the decision of the California state courts, the Supreme Court essentially held that the FAA superseded state laws that would allow arbitration clauses to be avoided by parties if they were

[17] *Id.* at 156.
[18] *Id.*
[19] *See* 42 Pa.C.S. § 7303.
[20] *Concepcion*, 563 U.S. at 338.
[21] Laster v. AT&T Mobility LLC, 584 F.3d 849, 854 (2009).
[22] 9 U.S.C.S. § 2.
[23] *Concepcion*, 563 U.S. at 338.
[24] *Id.* at 344.
[25] *Id.*

unconscionable. The FAA's strong policy in favor of arbitration outweighed the state's interest in protecting consumers from unfair arbitration clauses.

After this case, states were no longer allowed to refuse to enforce arbitration agreements, no matter how unconscionable the agreements were. This has made it much more difficult for consumers to bring class action lawsuits against businesses. While the *Concepcion* case was controversial when it was decided, it has had a significant impact on the law surrounding arbitration. It is a clear example of the Supreme Court's commitment to enforcing the FAA's strong policy in favor of arbitration.

C. Epic Systems:

In the *Epic Systems* case, the court considered the issue of whether the National Labor Relations Act (NLRA) prevented arbitration agreements from precluding class actions in employment cases.[26] The NLRA protects workers' rights to engage in collective action, including the right to unionize and the right to engage in concerted activity for mutual aid or protection.[27] In this case, three employees attempted to sue their employers in class actions after their employers denied them overtime wages. All three employers had required their employees, including the plaintiffs, to sign arbitration agreements that required them to individually arbitrate any claims against the employer; class actions were prohibited.[28] In court, the plaintiffs argued that the NLRA prohibited class action waivers, so the contracts were not enforceable.[29]

However, the court disagreed. It held that if employees signed an arbitration agreement with an employer, they were required to submit claims to arbitration and could not sue in

[26] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).
[27] 29 U.S.C.S. § 151.
[28] *Epic Systems*, 138 S. Ct. at 1619, 1620.
[29] *Id.* at 1620.

courts.[30] The arbitration agreements would be upheld even if the employer required the employee to sign the agreement as part of their employment, as the plaintiffs in *Epic Systems* had. The Court thus held that arbitration agreements between employers and employees that require claims to be brought on an individual basis do not violate the NLRA because the NLRA does not specifically mention class actions or express disapproval of arbitration as a dispute resolution method for employment cases.[31] The Court further held that the FAA requires courts to enforce such agreements as they are written. Thus, litigants in federal court were similarly left with no way to get out of an arbitration agreement. This case also extended the reach of mandatory arbitration to employees, not just consumers.

The impact of this case on workers' rights has been significant. It has made it more difficult for workers to hold their employers accountable for wage and hour violations, discrimination, and other workplace violations. It has also made it more difficult for workers to join together to negotiate better working conditions, wages, and benefits. The decision has also led to criticism that it favors employers over employees and may lead to a reduction in workers' bargaining power. The *Epic Systems* opinion itself, authored by Justice Gorsuch, alludes to the controversy: "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written… Because we can easily read Congress's statutes to work in harmony, that is where our duty lies."[32]

The outcomes of the *Concepcion* and *Epic Systems* cases, taken together, have serious implications for both employees and consumers. Such plaintiffs attempting to bring suit against either a company or their employer no longer have a legal remedy in either state or federal court

[30] *Id.* at 1622.
[31] *Id.*
[32] *Id.* at 1632.

if they sign an arbitration agreement or a contract containing an arbitration clause. When read against the backdrop of adhesion contracts and the duty to read, no arbitration clause will be overturned by courts. Thus, its practice and use by large companies has increased exponentially.

Part III: The Issue

Perhaps mandatory arbitration could be tolerated if it delivered on its promise to make legal remedies more available to people who lack access to the judicial system. However, many empirical studies have demonstrated that this is not the case.

A. Problems With Arbitration:

Over time, with the more widespread use of arbitration as a means of resolving disputes, a few major problems have emerged.

One issue arising from arbitration is the closed record. Arbitration proceedings are entirely private, meaning the facts and witnesses the arbitrator considered in making their decision are not disclosed to the public. When arbitration first came to forefront of American dispute resolution, this was seen as one of its strengths. Now, it is more commonly viewed as a flaw. Because arbitration disputes are settled off the public record, arbitrators do not have established precedent to ensure consistent outcomes. It also allows employers and businesses to keep claims against them from being made public.

Further, most (if not all) arbitration agreements preclude class actions.[33] This means that plaintiffs with individually small claims cannot aggregate their claims into a collective action against a common defendant. Without class actions as a remedy, many consumers and employees with individually small claims would find bringing any action inefficient. The average wage theft

[33] Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 11.

claim is $1,393.[34] This is almost a month's pay for the average retail cashier or housekeeper[35]; yet, it is significantly lower than the costs of arbitrating a claim, which can reach tens of thousands of dollars from start to finish.[36] Thus, while employees could bring claims in theory, a simple cost benefit analysis would likely discourage them from pursuing a claim, even if they felt it had merit.

The repeat player problem has also emerged as a growing issue in arbitration. This refers to an employer's ability to choose the arbitrator who will hear any claims brought against them. As a result of the desire to generate repeat business with the employer, the arbitrator will increasingly rule in favor of the employer and against the employee. One study shows that the first time an employer appeared before an arbitrator, the employee had a 17.9% chance of winning, but after the employer had four cases before the same arbitrator the employee's chance of winning dropped to 15.3 percent, and after 25 cases before the same arbitrator the employee's chance of winning dropped to only 4.5 percent.[37]

B. Arbitration versus Litigation:

First, while arbitration has been hailed as a low cost alternative to litigation, it may not be cost effective at all. In fact, arbitration usually carries far more required fees than state and federal courts. This means the overall costs associated with arbitrating claims are much higher than court fees. An initial filing fee in state small claims court ranges from $30-200[38]. Federal

[34] U.S. Department of Labor, Wage and Hour Division, *Data & Statistics*, https://www.dol.gov/agencies/whd/data#:~:text=WHD%20investigations%20in%20fiscal%20year,for%20three%20weeks%20of%20work (last visited Apr. 29, 2023).
[35] *Id.*
[36] Mark Fotohabadi, *How Much Does Arbitration Cost*, June 10, 2022, https://www.adrtimes.com/how-much-does-arbitration-cost/.
[37] Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*.
[38] STATE OF ALABAMA UNIFIED JUDICIAL SYSTEM: FEE DISTRIBUTION CHART (2015); *see also* NC JUDICIAL BRANCH: SMALL CLAIMS, https://www.nccourts.gov/help-topics/lawsuits-and-small-claims/small-claims (last visited April 29, 2023).

court filing fees are $350.[39] Courts have no other mandatory costs or fees, though the parties may incur costs related to litigating a case, such as travel and hiring legal counsel. In arbitration, initial filing fees are as low as $1,000 and can be as high as $4,300.[40] Parties in arbitration also pay additional fees for discovery and a hearing, which are usually in the hundreds of dollars, as well as ongoing administrative fees and the arbitrator's hourly fee, which can be as high as $375 an hour.[41] Some plaintiffs were also required to pay a $2,750 fee per day to have a hearing.[42] Additionally, most arbitration agreements contain fee-shifting provisions that may require the employee to cover certain costs or split them in half. Some fee-shifting provisions may impose all the costs of arbitration on the losing party (which is often the employee).

Damages awards in litigation are exponentially higher than those awarded employees in arbitration. A recent study shows a median of $36,500 in damages is awarded under arbitration, compared to $176,000 in federal courts and $86,000 in state courts.[43] Another study with a different arbitration servicer suggests an even higher disparity: The average (mean) amount of damages awarded to plaintiffs in employment cases is $23,548 in mandatory arbitration, $143,497 in federal court, and $328,008 in state court.[44]

Further, employees are far less likely to win in arbitration than they are in litigation. Employee win rates in mandatory arbitration win only about 21.4 percent of the time, 59 percent of the time in the federal courts, and 38 percent of the time in state courts.[45] As a result of the

[39] UNITED STATES COURTS: U.S. COURT OF FEDERAL CLAIMS FEE SCHEDULE (2020).
[40] Lucey v. FedEx Ground Package Sys., U.S. Dist. LEXIS 77454, at 6 (2007).
[41] *Id.*
[42] *Id.*
[43] Christopher Ingraham, *There's a little-known employment contract provision enabling billions of dollars in wage theft each year*, https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/, last accessed March 1 2023.
[44] Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 20.
[45] *Id.*

low likelihood of success, over 98% of workers will abandon a claim against an employer rather than attempt to arbitrate the issue against them.[46] Only 2% of workers will actually proceed with a claim after they find out they are subject to an arbitration agreement.[47] This means that employers who violate the law are not held accountable to their employees or to society; they most often evade liability as well as any other significant consequences.

C. Effects on Worker's Rights

The increased costs of arbitration have not gone unnoticed by legal scholars, workers' rights groups, or consumer advocates. States are enacting laws to curb wage theft violations that could allow workers to bring suit on behalf of the state[48]. Recently, the US Department of Labor has also sought to prosecute claims for workers who are subject to mandatory arbitration to ensure the law is sufficiently enforced against employers engaging in illegal practices.[49]

However, little recourse outside arbitration is available for workers themselves. It is estimated that 65% of low wage employees (those making $13 or less an hour) are subject to mandatory arbitration clauses as well as 56% of all non-union private sector employees.[50] Overall, mandatory arbitration is estimated to affect over 60 million workers in the United States.[51] Should these workers become victims of wage theft, discrimination, or harassment, they would have no legal recourse besides arbitration, where they face almost certain defeat.

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[46] Christopher Ingraham, *There's a little-known employment contract provision enabling billions of dollars in wage theft each year*, https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/ (last visited April 29, 2023).
[47] *Id*.
[48] Chris Marr, *Wage Violations Targeted in Latest State Legislative Proposals*, BLOOMBERG LAW, June 28, 2022, https://news.bloomberglaw.com/daily-labor-report/wage-violations-targeted-in-latest-state-legislative-proposals.
[49] U.S. Dep't of Labor, *Mandatory Arbitration Won't Stop Us from Enforcing the Law*, (Mar. 20, 2023, 2:43 PM), https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law#:~:text=And%20because%20many%20mandatory%20arbitration,now%20subject%20to%20mandatory%20arbitration.
[50] *Id*.
[51] *Id*.

It is estimated that wage theft costs US employees over $15 billion a year[52]. Most of this money will never be recovered and provided to the employees who earned it because the costs of bringing a claim outweighs the amount of the money they lost.

Further, there is evidence that the number of forced arbitration for both consumers and employees increased during the COVID-19 pandemic.[53] As the number of arbitrations went up, the employee win rates went down to only 5.3%.[54] From 2019 to 2020 alone, the number of forced arbitrations increased 17%.[55] While 60 million employees are currently subject to mandatory arbitration agreements, only 82 employees won cases in 2020.[56] Top corporate defendants in mandatory arbitration claims include Family Dollar, Chipotle, and Macy's.[57] While some companies have started to move away from mandatory arbitration agreements, other companies (including Tesla) embrace the practice now more than ever.[58]

Thus, we can see that the practice of mandatory arbitration in the workplace is stronger than ever and has grown in strength and scope since *Concepcion* and *Epic Systems*.

Part IV: Empirical Analysis

Traditionally, for contract terms to be enforceable, the parties should reach a "meeting of the minds," or generally know and understand what the terms of the contract are.[59] This school of doctrine has essentially been replaced by the duty to read, as courts hold that even a small indication of consent is sufficient to bind the parties.[60] However, I believe that even if people did

[52]Katie Lester, *Forced Arbitration Robs Workers Billions in Wages*, CENTER FOR PROGRESSIVE REFORM BLOG, February 4, 2021, https://progressivereform.org/cpr-blog/forced-arbitration-robs-workers-billions-wages/.
[53] American Association for Justice, *Forced Arbitration in a Pandemic: Corporations Double Down*, Oct 27, 2021, https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. Rev. 2255 (2019).
[60] *Id.*

read the terms of adhesion contracts, they would probably be unaware of the legal consequences of certain provisions. While arbitration clauses can have drastic effects on one's legal rights post-*Concepcion* and *Epic Systems*, I suspected that most people were unaware of these effects, such as lower damages awards, decreased chances of winning, and higher required costs and fees.

This finding could be significant because it undermines the meaning of the duty to read; while the duty to read assumes that people are able and willing to read contractual terms, simply reading them would be pointless if one does not understand the legal effects of what they are agreeing to. The duty to read has been used as a proxy for consent; but how could one consent to terms they lack fundamental knowledge of. Alternatively, if people do understand what agreeing to arbitration means for their potential claims, it could indicate that perhaps arbitration is a smaller issue than scholars make it out to be. If people walk into arbitration agreements with full knowledge of it, they have knowingly and understandingly consented to be bound. While terms such as arbitration may be unfavorable to employees, they do have the right to enter into whatever contracts they choose.

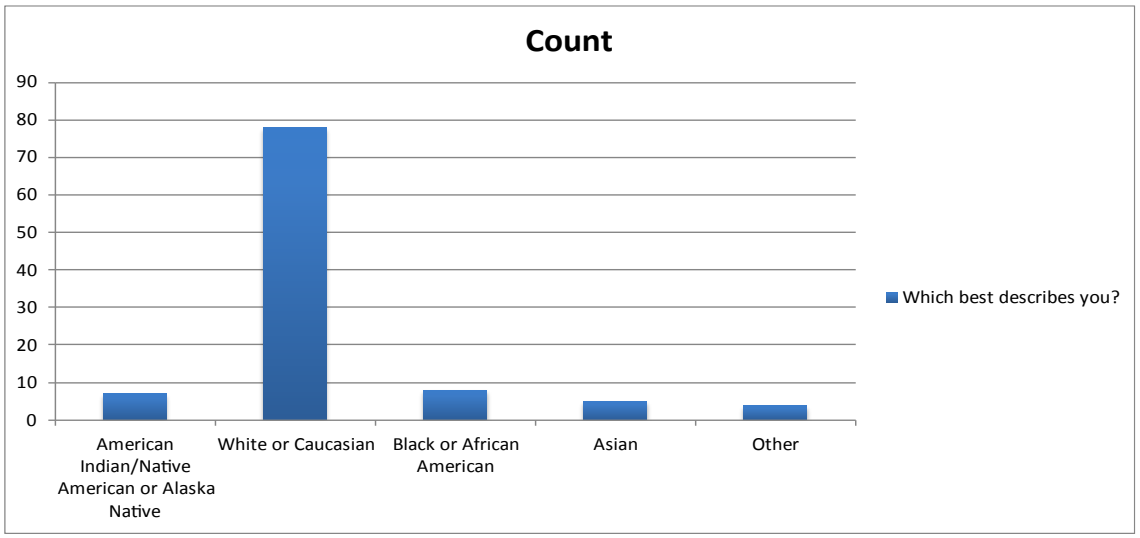
A. Methodology:

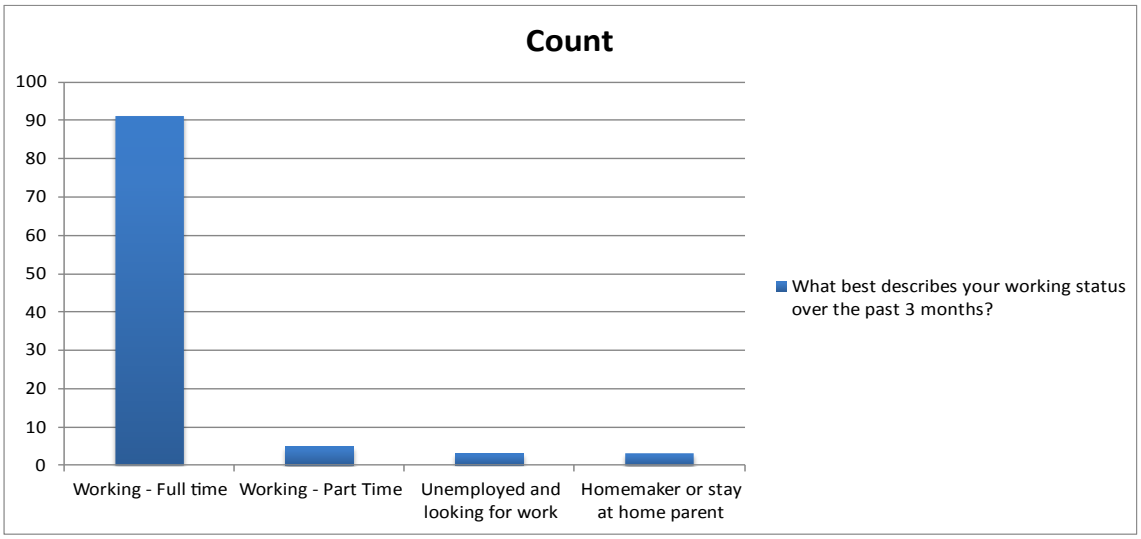
The purpose of the study was to determine if people understood the consequences of arbitration clauses and how such provisions affected their rights. There were two possible outcomes: one possibility was that people knew what agreeing to arbitration provisions meant, and they willingly accept these consequences when they signed contracts containing these clauses; the other possibility was that people did not fully understand the implications of agreeing to arbitration and thus enter into such agreements without knowing the consequences of doing so.

To conduct the research, I first wrote survey questions on Qualtrics. The survey had key questions about arbitration itself as well as questions where the respondents compared arbitration directly to litigation. The survey was then published on Positly. From Positly, people who agreed to participate in the study were rerouted to the Qualtrics page, where they completed the survey. Qualtrics collected all the answers and organized the data into reportable results.

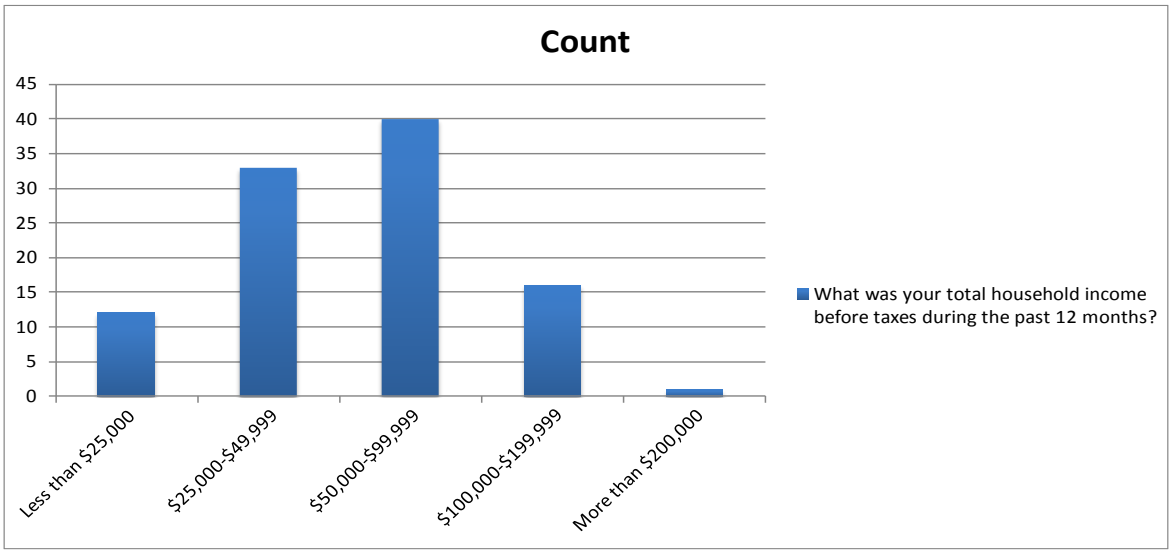
B. Results:

We recruited a total of 89 respondents to respond to the survey. While this is a small sample size, the findings demonstrate important issues regarding employees' understanding of arbitration. In terms of demographics, many survey respondents (53%) had a bachelor's degree or above. 89% of the respondents were working full-time. The respondents were skewed Caucasian (76.5%, compared with the 57% national average). Additionally, the respondents were 57.8% male and 42.2% female.

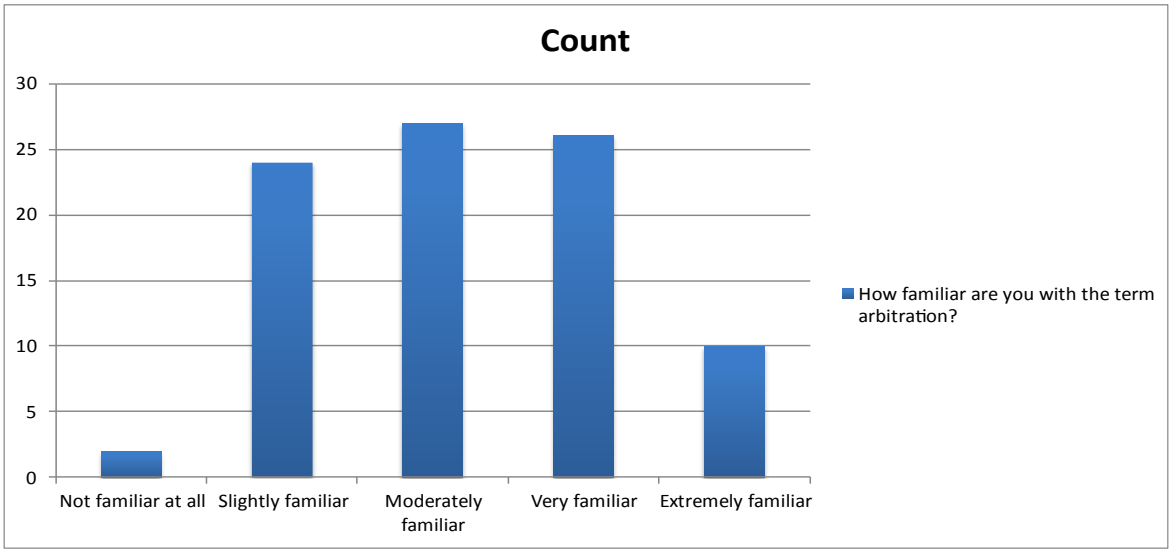




Additionally, the respondents mostly had average or below average income, with 83.4% reporting income under $100,000. Mandatory arbitration affects millions of workers who largely lack the resources to challenge their employment contracts or raise a claim against an employer in arbitration. It is also very likely that our respondents are either currently subject to arbitration agreements under their current employers or have been subject to mandatory arbitration in the past. The responses they provided are therefore very valuable; we had the opportunity to learn from employees affected by arbitration agreements themselves.



We asked the respondents how familiar they were with the term arbitration. We also asked the respondents to describe what they thought arbitration was in their own words. For the most part, the respondents seemed confident in their own knowledge of arbitration, with most of them (97.8%) indicating some level of familiarity with the term.



Answers to the free-response questions indicate the respondents also seemed to generally understand what arbitration was. For example, one respondent wrote: "Arbitration resolves disputes outside the judiciary courts." Another wrote: "Using a 3rd party to settle a dispute." Another replied: "Settling a dispute by an independent third party." While these are only a few examples, the responses taken as a whole showed that in general, people are aware of the fundamentals function of arbitration. The descriptions are also neutral; no one indicated a strong preference either for or against arbitration.

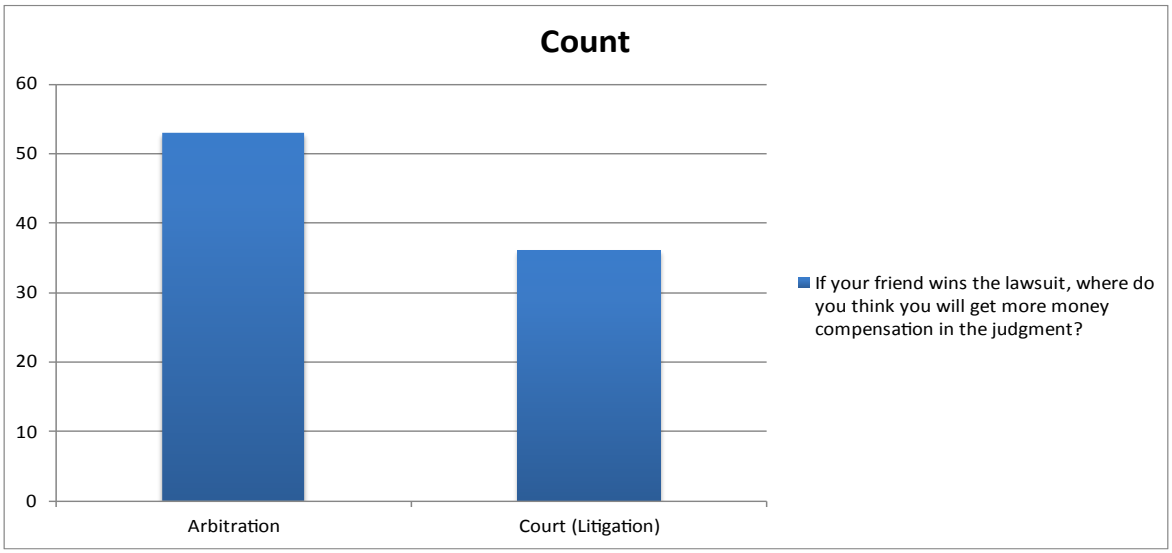
However, in another free response question, when presented with an arbitration clause and asked to explain what it meant, the respondents fell short of accuracy. This means they may lack a basic knowledge of what the language was conveying. The arbitration provision read:

"Any controversy or claim arising out of or relating to this Agreement or the parties' dealings shall be settled by arbitration in the City of New York, NY, in accordance with the then-governing rules of the American Arbitration Association. If such organization ceases to exist, the arbitration shall be conducted by its successor, or by a similar arbitration organization, at the time a demand for arbitration is made. The decision of the arbitrator shall be final and binding on both parties. Judgment upon the award rendered may be entered and enforced in any court of competent jurisdiction."

One respondent said: "If you have an issue, you need to engage in arbitration with the company or it's [sic] successor in NYC to come to a binding outcome." Another wrote: "If a disagreement happens between the two parties then the issue will be settled outside of court (arbitration) by the arbitration organization listed." However, many respondents wrote "n/a" or

"nothing," suggesting they either could not read or did not understand the arbitration provision. It could also mean they didn't read the provision closely enough to extract its meaning.

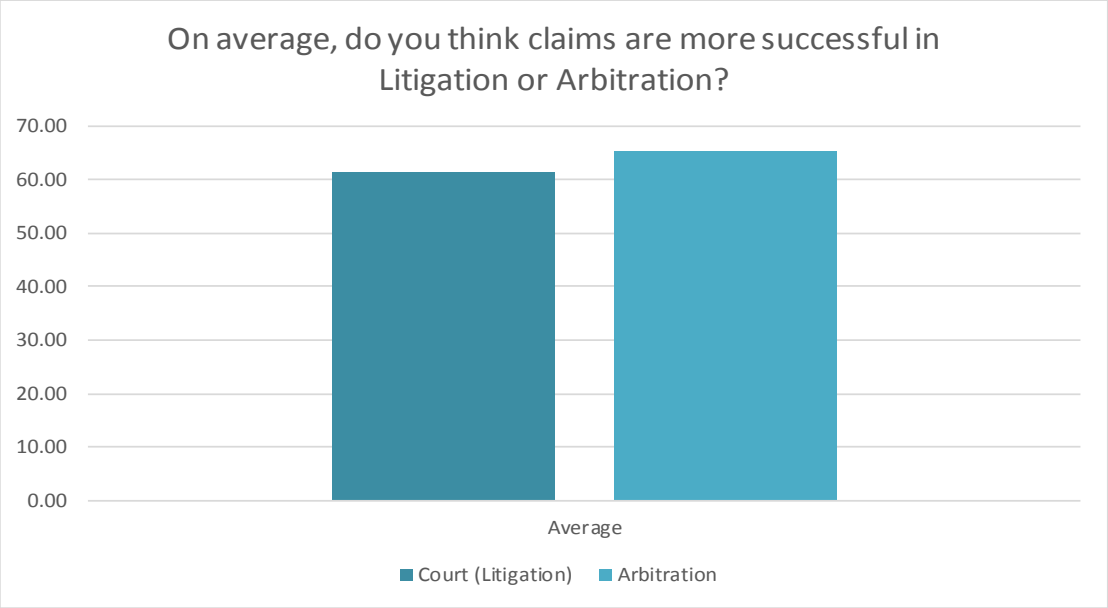
Further, when asked specific questions about arbitration, the respondents seemed to collectively stumble. First, the respondents believed that arbitration would result in higher money damages being awarded to a successful claim. They were presented with a hypothetical situation regarding a friend who is subject to an arbitration agreement, and then asked where they believed the friend would win the most money.



The respondents also thought claims fared slightly better in arbitration than in traditional litigation. On average, the respondents believed court cases were successful for plaintiffs in wage theft claims 61% of the time in litigation and 65% of the time in arbitration. This can be compared to actual win rates: plaintiffs succeed in wage theft claims in federal court 59% of the time[61] and only 5.3% of the time in arbitration.[62] While the respondents were fairly accurate in

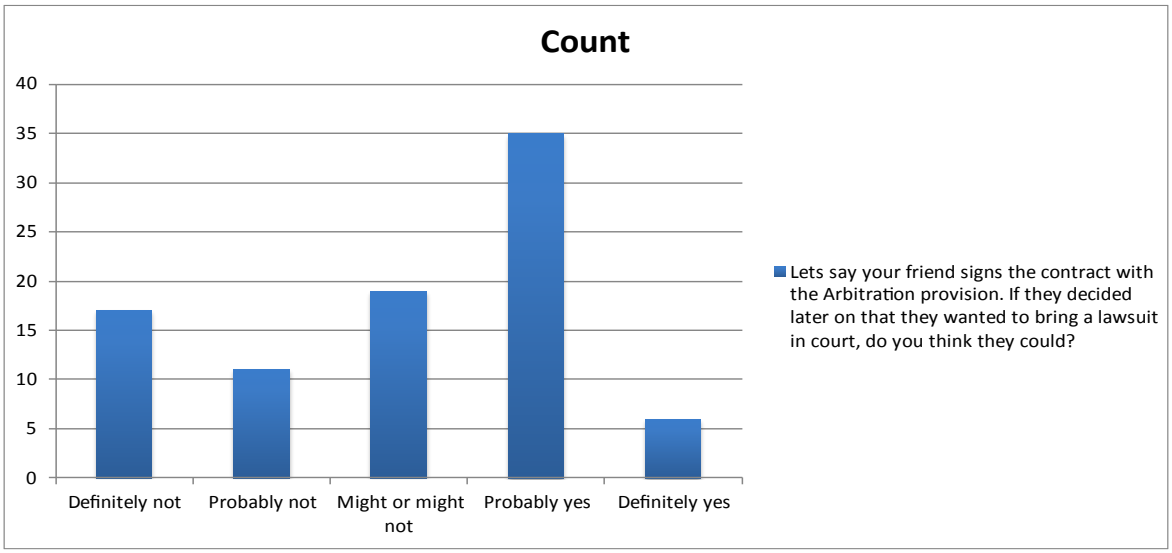
[61] Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 20.
[62] American Association for Justice, *Forced Arbitration in a Pandemic: Corporations Double Down*, Oct 27, 2021, https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic.

predicting their likelihood of success in litigation, they drastically missed the mark on arbitration. Perhaps more importantly, they believed as a whole that their chances were better in arbitration, while this has been shown to not be the case.



One of the more surprising results was that the respondents did not seem to realize that arbitration clauses foreclosed the possibility of bringing a lawsuit in court. When asked if they believed whether or not they could bring a lawsuit in court while subject to an arbitration agreement, most of the respondents indicated they thought they could, with the most common answer being "probably yes." As we have observed from the case law, this is inaccurate. The Supreme Court has held that the FAA mandates arbitration if the parties agreed to it.[63] This was a rather troubling discovery, as it is completely incorrect given current precedent.

[63] *Epic Systems*, 138 S. Ct. at 1632.



C. Analysis

The study shows that most people have significant misconceptions about the costs and benefits of arbitration as an alternative dispute resolution method. While this was a smaller study, and the findings are not technically statistically significant, they do raise several red flags. They support the second possibility identified earlier: that people don't fully understand the implications of agreeing to arbitration and thus enter into such agreements without knowing the consequences. As a whole, the results demonstrate that people's beliefs about the consequences of arbitration clauses are out of line with reality.

Overall, the respondents seemed to think that arbitration was generally more employee-friendly than traditional litigation. This stands in stark contrast with the common criticism of arbitration being exceedingly corporate-friendly. The respondents as a group were incorrect about the required costs of arbitration relative to litigation, how likely plaintiffs are to win claims, and the amount of damages they could expect to recover if they brought a successful claim for wage theft. Perhaps most importantly, they did not believe that an arbitration clause

precluded them from bringing a lawsuit in court. The expectation of litigation being an available remedy even with the presence of an arbitration provision speaks volumes. This shows a deep misunderstanding of the goals of arbitration provisions and the policies promulgated by the FAA (and supported by the Supreme Court) itself.

I think the results show a disconnect between what people think about arbitration and what arbitration does in practice. They indicate that people are not nearly as wary of arbitration as they should be. As long as these perceptions continue, large companies can continue to use this dispute resolution method to avoid accountability for violating the law while people remain oblivious – that is, until or unless they are faced with bringing a claim.

I would argue that this lack of basic understanding of arbitration weighs strongly in favor of returning to an unconscionability standard for arbitration agreements, or at least subjecting them to some level of judicial scrutiny. This issue goes beyond the duty to read. While the duty to read requires several assumptions about one's ability and willingness to read the terms of a contract, the results from this study suggest that reading the contract would do little to no good. The respondents here were confident in their understanding of arbitration, yet they were mistaken about the real implications of such an agreement. Had they been presented with the arbitration provision in the survey, they would have readily agreed to the terms with the full belief that they were likely better off pursuing claims in arbitration and not in court. This raises the issue of whether the parties have truly consented to be bound by such unfavorable terms, or whether they rather just didn't have the bargaining power to dispute the terms at the outset of the contract formation. This is exactly what the Discover Bank rule sought to prevent.[64]

[64] *Discover Bank*, 36 Cal. 4th at 153.

Also, the Court in Epic Systems said that Congress was free to amend the NLRA at any time to preclude class action waivers.[65] In light of the increased amount of wage theft that has occurred in the years since *Epic Systems*, I think the legislature should amend the statute accordingly. Individual claims are unlikely to succeed and are not cost effective; employees need the remedy of collective action if they are to successfully hold their employers accountable for breaking the law.

This survey strongly indicates that parties who agree to be bound by arbitration agreements have several key misconceptions about arbitration. While the courts have declined to offer judicial remedies, I would recommend as a matter of policy that companies begin to settle claims outside of arbitration, at least for small claims (i.e. anything less than $10,000). Some companies have bowed to social pressure regarding harassment claims, and others have moved away from forced arbitration entirely.[66] If the country is going to try to meaningfully combat wage theft, employees themselves need to be empowered to seek legal action themselves in small claims court. Small claims are governed by states and generally require low filing fees.[67] Claims are also typically straightforward enough to not require hiring legal counsel.[68]

Further, while states have traditionally been prevented from countering the FAA, I think their own legislation for combating wage theft should be honored if any come to fruition. Should states themselves take action against corporations, corporate defendants would be less able to avoid liability. Some examples of proposed state remedies include allowing employees to sue

[65] *Epic Systems*, 138 S. Ct. at 1630.
[66] American Association for Justice, *Forced Arbitration in a Pandemic: Corporations Double Down*, Oct 27, 2021, https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic.
[67] NC JUDICIAL BRANCH: SMALL CLAIMS, https://www.nccourts.gov/help-topics/lawsuits-and-small-claims/small-claims (last visited April 29, 2023).
[68] *Id.*

employers on behalf of the state and empowering state labor boards to pursue prosecution and increased damages for companies that violate wage theft laws.[69]

Part V: Conclusion

While the court has held that the law regarding mandatory arbitration is clear, they conceded that the policy debate was far from over.[70] Moving forward, this research should help inform policy decisions that could enable smaller parties to hold their employers accountable for wage theft violations. Not only is there a massive problem concerning wage theft that affects thousands of workers a year, there are inadequate judicial remedies to help employees enforce their rights. The research conducted here shows that employees lack the knowledge to contest arbitration provisions themselves; they lack basic knowledge of the consequences of agreements to arbitrate claims. Situations such as this call for legal action, either from courts or legislators. In the future, courts must support any effort to combat the wage theft issue.

[69] Chris Marr, *Wage Violations Targeted in Latest State Legislative Proposals*, BLOOMBERG LAW, June 28, 2022, https://news.bloomberglaw.com/daily-labor-report/wage-violations-targeted-in-latest-state-legislative-proposals.
[70] *Epic Systems*, 138 S. Ct. at 1632.

Applicant Details

First Name	**Catherine**
Middle Initial	**G**
Last Name	**Kinley**
Citizenship Status	**U. S. Citizen**
Email Address	**kinlcg21@wfu.edu**
Address	**Address** Street **7723 Athens rd** City **Stokesdale** State/Territory **North Carolina** Zip **27357** Country **United States**
Contact Phone Number	**3364306892**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2021**
JD/LLB From	**Wake Forest University School of Law** **http://www.law.wfu.edu**
Date of JD/LLB	**May 20, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Wake Forest Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Stanley Moot Court Competition** **Wake Forest Law Moot Court Board Member** **Walker Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Taylor, Margaret
taylormh@wfu.edu
(336) 758-5897
Boike, Elise
ekboike@gmail.com
(248) 622-3477
Schang, Scott
schangs@wfu.edu

References

Jesse Williams
(336) 251-3876
williajb@wfu.edu,

Grady McCallie
(919) 802-7592
grady@ncconservationnetwork.org,

Pamela Harrigan-Young
(919) 809-7990
pamela@phylaw.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 13, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am writing to apply for a clerkship in your chambers beginning in 2024, or during a later term. I am a rising third-year student at Wake Forest University Law School, where I actively contribute to the *Wake Forest Law Review* and Moot Court team. I have attached a resume, law school grade sheet, writing sample, and list of references.

What sets me apart as an applicant is my unique perspective as a first-generation college student. Growing up in an environment where higher education was not a common path, I have cultivated a strong work ethic, resilience, and resourcefulness that have been instrumental in my academic achievements. This background allows me to approach legal issues with a fresh and empathetic perspective, making me well-suited for the challenges of a clerkship.

Being a native of the South, I possess a deep connection and strong commitment to the Southern community. It is my earnest aspiration to contribute to the legal landscape by practicing law in the South. A clerkship in your chambers would provide me with an invaluable opportunity to gain firsthand experience and make a positive impact on the South's legal system.

I am particularly drawn to the clerkship opportunity within your chambers due to my involvement in bankruptcy litigation in my current summer associate position. This experience has instilled in me a strong desire to gain practical experience and develop a comprehensive understanding of the intricacies of bankruptcy law. Moreover, I will expand my knowledge by enrolling in my school's bankruptcy course this upcoming semester.

Professors Scott Schang and Margaret Taylor as well as attorney Elise Boike have submitted separate letters of recommendation on my behalf. If there is any other information that might be helpful, please let me know. I would welcome the opportunity to interview with you. Thank you for your consideration.

Sincerely,

Grace Kinley

Grace Kinley

Winston-Salem, NC
Kinlcg21@wfu.edu | (336)430-6892

EDUCATION

WAKE FOREST UNIVERSITY SCHOOL OF LAW
Juris Doctor Candidate, May 2024
GPA: 3.655, Class Rank: 22/151 (Top 15%)

Honors: *Wake Forest Law Review* Staff Member; Dean Reynolds Award Recipient in Torts (Highest Grade); George K. Walker Moot Court Competition (Top 16); Pro Bono Honor Society

Activities: Teacher's Assistant Position: Torts; Moot Court Board Member; Edwin M. Stanley Moot Court Competition; UNC Townsend Trial and Zeliff Trial Competitions; Transactional Law Competition; Environmental Law Clinic; Part-time Library Desk and IT Help Desk Assistant

Pro Bono: Project Coordinator for Immigration Pro Bono Project; Wills, Expungements, Know Your Rights, Healthcare Advocacy

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL
Bachelor of Arts, *cum laude*, May 2021
GPA: 3.619

- Major in Political Science, Major in Peace War and Defense, Minor in History
- Study Abroad: Burch Field Research Seminar in the U.K. and Ireland

LEGAL EXPERIENCE

RAYBURN COOPER & DURHAM, P.A. – Charlotte, NC
Summer Associate May 2023 – August 2023

- Researched a variety of legal issues including bankruptcy issues and contract disputes
- Managed large document review projects
- Assisted with litigation and mediation preparation
- Drafted blog posts summarizing recent NC Business Court decisions for RCD's "Business Court Blast"

LAKESHORE LEGAL AID – Detroit, MI
Summer Law Clerk: May 2022 – August 2022

- Appeared in the 36th District Court before the Honorable Judge Ruth Ann Garrett
- Provided legal representation to low-income tenants during nonpayment and termination of tenancy hearings
- Conducted intakes to ensure tenants' eligibility for nonprofit services
- Performed legal clerical work – created spreadsheets with party, compliance, and lawsuit status information
- Drafted legal documents, communicated directly with clients, and completed legal research and trial preparation

LEGAL AID OF NORTH CAROLINA – Pittsboro, NC
Intern: March 2020 – June 2020

- Organized a pro bono wills clinic with the Marian Cheek Jackson Center and Orange County Bar Association
- Coordinated wills and end-of-life document drafting for low-to-moderate-income residents
- Partnered with Attorney, Erin Haygood, shadowing her in court and assisting her with tasks and organization

OTHER EXPERIENCE

CAROLINA POLITICAL REVIEW – Chapel Hill, NC
Staff Contributor: August 2020 – May 2021

UNC CALL CENTER – Chapel Hill, NC
Student Caller: September 2018 – March 2020

VARIOUS RESTAURANTS – Chapel Hill and Greensboro, NC
Server/Hostess: October 2016 – August 2021

WAKE FOREST UNIVERSITY
SCHOOL of LAW

Margaret H. Taylor
Professor of Law

Telephone: (336) 758-5897
FAX: (336) 758-4496
Email: taylormh@wfu.edu

June 2, 2023

Letter of Recommendation for Clerkship Applicant Catherine (Grace) Kinley
JD Candidate, Wake Forest University School of Law, 2024
Uploaded via OSCAR

Dear Judge:

I am writing to recommend Catherine (Grace) Kinley to be your judicial clerk. Grace is a member of the Class of 2024 at Wake Forest University School of Law. She is in the top fifteen percent of her class and has an impressive list of extracurricular activities, which includes being named to the Wake Forest Law Review and the Moot Court Board. Importantly, Grace accomplished this while holding down several part-time jobs during the school year (including as a Library Desk and IT Help Desk Assistant). Similarly, as a first-generation college student who graduated *cum laude* from the University of North Carolina at Chapel Hill in 2021, Grace worked throughout her undergraduate career to support herself as an undergraduate student.

Grace was a student in my Torts class in her first year of law school, and out of forty-two students in my class that year I selected her to be my Teaching Assistant the following year. I knew that Grace would be an excellent role model and mentor to 1L students; I also had the utmost confidence in her substantive knowledge, analytical ability, work ethic, and stellar interpersonal skills. Grace's work last year far exceeded my expectations. She helped to create a community among our first-year students, provided support to and answered questions from 1Ls, and gladly said "yes" to each request from me. Grace consistently met deadlines and took appropriate initiative, and overall was an excellent TA.

I recommend Grace to be your judicial clerk with tremendous enthusiasm. I believe she would be a real asset to your chambers. Please do not hesitate to contact me if I can provide any additional information.

Sincerely,

Margaret H. Taylor

Margaret H. Taylor
Professor of Law

Worrell Professional Center | P.O. Box 7206 | Winston-Salem, NC 27109

June 12, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am very pleased to recommend Grace Kinley for a clerkship position in your chambers. I am a staff attorney at Lakeshore Legal Aid and was fortunate to work directly with Grace during her 2022 Summer Internship with our organization. One of the chief reasons I believe Grace to be a strong candidate for your team is her ability to intuit what needs to be done- I'd often find that Grace had completed something before I'd even have a chance to task her with it. Grace was also an invaluable member of our team due to her willingness to assist others in our department and her interest in becoming involved in various projects. Grace regularly offered to step in and assist other legal assistants, law clerks and attorneys in their tasks, in addition to completing her own assignments and tasks.

Additionally, Grace was extremely organized, prompt and eager to learn more. She eagerly accepted every opportunity offered to her in order to grow and experience as much as possible. Our department specifically defends indigent tenants facing eviction in Detroit. Grace worked daily with clients who often had complex legal and social issues pertaining to their case, and Grace treated each client with respect and care. She listened carefully and thoughtfully and regularly identified legal issues in our clients' cases. Grace brought enthusiasm, humor and intelligence to her internship, and she would be a wonderful addition to your office. I am confident in her ability and the future lawyer she will become.

Please do not hesitate to reach out to me with any questions.

Thank you,

Attorney Elise Boike
Lakeshore Legal Aid

Elise Boike - ekboike@gmail.com - (248) 622-3477

WAKE FOREST
UNIVERSITY
SCHOOL *of* LAW

March 31, 2023

To Whom It May Concern:

I write to heartily recommend Grace Kinley for a judicial clerkship. Grace was a student in my Environmental Law class and is currently a clinician in the Environmental Law and Policy Clinic. I have been lucky to interact with Grace over the past year, and she is one of the strongest overall students I have had at Wake Forest.

Grace is one of those students who can surprise you. She can be quiet and unassuming, but she often contributes the most insightful and helpful comments in class and in Clinic. As a clinician, she has shown herself to be a consummate teammate, working hard to keep her matters on track and her fellow students on task. Grace has worked on an heirs' property matter this semester where her contributions were singled out by our law fellow, Jesse Williams, as among the strongest in the Clinic. Grace has also worked on an environmental matter this semester where her teammate has not pulled her weight, but Grace has kept her composure, ensured the client still receives the best advice, and undertaken excellent research and counseling.

Grace is a thoughtful person who can be underestimated because of her quiet, self-deprecating manner. But if I were selecting a student to work with me over the summer to keep our matters running smoothly, Grace would be my go-to student. Her ability to master research, write well, and work well with others make her the kind of well-rounded law student who will excel in practice.

If you have any questions or would like further information, please do not hesitate to contact me at 202-674-6076 or schangs@wfu.edu.

Sincerely yours,

Scott E. Schang
Professor of Practice
Director, Environmental Law & Policy Clinic

P.O. Box 7206 | Winston-Salem, NC 27109

Grace Kinley
Winston-Salem, NC
Kinlcg21@wfu.edu
(336) 430-6892

Writing Sample

As a second-year student at Wake Forest University School of Law, I prepared the attached brief for my Appellate Advocacy Course. I wrote the brief in support of reversing the grant of summary judgment to a school that punished a student for exercising his First Amendment rights by wearing a political T-shirt. My professor permitted me to use this brief as a writing sample.

RECORD NO. 22-823

In the
United States Court of Appeals
for the Sixth Circuit

GAVIN PAINTER, by and through his father, DONALD PAINTER,
Plaintiff-Appellant,

v.

AMY DOYLE, SUPERINTENDANT; EDISON MAGNET MIDDLE SCHOOL; and DAYTON PUBLIC SCHOOL SYSTEM,
Defendants-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF APPELLANT

Grace Kinley

ISSUE PRESENTED

I. Under *Tinker*, which allows schools to prohibit speech that causes disruption or risk of disruption, can a school administrator discipline a student that did not cause an actual disruption for creating a potential risk of disruption without providing a constitutionally valid justification for anticipating disruption?

ARGUMENT

This Court should reverse the district court's decision because Gavin's speech was not disruptive to the School's educational mission. Gavin brought this action by and through his father, Donald Painter, under 42 U.S.C. § 1983, which provides a cause of action for individuals when a person acting under color of law violates their constitutional rights. 42 U.S.C. § 1983. The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I. The Due Process Clause of the Fourteenth Amendment applies the First Amendment to the states and "protects the citizen against the State itself and all of its creatures–Board of Education not excepted." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id*. at 506. Students' rights to freedom of speech must be carefully protected "if we are not to strangle the free mind at its source." *Id*. at 507. While students' constitutional rights in school are not "coextensive with the rights of adults in other settings," the classroom is a "marketplace of ideas" that requires the freedom to engage in a robust discussion of ideas and viewpoints. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986);

Id. at 512. Although school officials can limit student speech, schools must show a constitutionally valid reason for doing so. *Fraser*, 478 U.S. at 682; *Tinker*, 393 U.S. at 511. Generally, for a school's prohibition of student speech to be sustained, the school must show that the forbidden conduct "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (*quoting Burnside v. Byars* 363 F.2d 744, 749 (5th Cir. 1966)).

There are three exceptions to this general rule. First, schools have the discretion to prohibit speech, without a showing of disruption, if the speech is "lewd, indecent, or offensive." *Fraser*, 478 U.S. at 683. Second, if the speech at issue is school-sponsored, then the school may regulate it "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Finally, a school may restrict speech reasonably viewed as promoting illegal drug use. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

Both parties have stipulated that Gavin's shirt was not school-sponsored speech, nor was it advocating illegal drug use, so these exceptions are not at issue here. The remaining issue is whether the School had a constitutionally valid justification for suppressing Gavin's speech under the standard in *Tinker*. Gavin's shirt did not materially and substantially interfere with the operation of the School. Accordingly, the School did not have a constitutionally valid justification to prohibit Gavin's speech, and the district court erred in granting the School's Motion for

Summary Judgment. Therefore, this Court should find in favor of Gavin and reverse the district court's decision.

I. The district court erred in holding that Gavin's shirt materially and substantially interfered with the School's operation because Gavin's shirt did not cause any disruption, and the School did not show a constitutionally valid reason to forecast such a disruption.

Gavin's shirt did not materially and substantially interfere with the School's operation because it did not cause an actual substantial disruption, and the School did not show a constitutionally valid reason to forecast disruption. While school officials have a limited ability to suppress disruptive speech, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 507–08. To prohibit student speech under *Tinker*, a school must show that a substantial disruption occurred or demonstrate specific facts that led the school to reasonably forecast a substantial disruption. *Id*. at 514. Here, no substantial disruption occurred, and the School did not demonstrate specific facts that support a reasonable forecast of disruption. Accordingly, Gavin's shirt did not materially and substantially interfere with the operation of the School.

A. The district court erred in holding that Gavin's shirt caused a material disruption because it did not disrupt classwork or invade the rights of others.

Gavin's shirt did not cause an actual substantial disruption because the shirt did not disrupt classwork or invade the rights of others. A substantial disruption "disrupts classwork or involves substantial disorder or invasion of the rights of

others" *Id*. at 513. A display of speech invades the rights of others when it leads to threats or acts of violence. *Id*. at 508.

In *Tinker*, school officials suspended students who wore black armbands to school when they refused to remove them. *Id*. at 504. Since only a few students wore the armbands, there was no indication that they disrupted class. *Id*. at 508. Although some students made hostile remarks to the students wearing the bands, there were no threats or acts of violence. *Id*. The Supreme Court held that since the armbands did not interfere with school work nor "concern aggressive, disruptive action or even group demonstrations," the speech was a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id*. Therefore, the armbands did not constitute a material and substantial disruption, and the school officials could not constitutionally prohibit them. *Id*. at 514.

Here, Gavin's shirt did not constitute an actual material disruption because it did not cause interference with school work. In *Tinker*, the armbands did not interfere with school work because they were a silent, passive expression of opinion. Likewise, Gavin's shirt did not interfere with school work because it was a silent, passive expression of opinion. Further, in *Tinker*, the armbands did not disrupt class because only a few students wore them. Similarly, Gavin did not disrupt class because he was the only student wearing the shirt. Gavin did not behave disruptively because he individually and silently walked into class wearing a shirt that expressed his political opinion. While Gavin's shirt did change the class topic for the day, this change was beneficial, not disruptive. Cook reserves part of her

class time for current events, and the School takes pride in encouraging students to discuss issues respectfully. Gavin's shirt did not interfere with school work because Cook used the shirt as an opportunity to further the school's mission and provide a forum to respectfully discuss immigration.

Further, Cook did not end her class early because of any disruption caused by Gavin's shirt. Cook made the last twenty minutes of class a study hall so she could call Doyle. While the call may have interfered with class time, Gavin did not cause the interference. The class was engaging in a respectful discussion, but Cook still called Doyle to prevent her from being surprised and looking bad on camera. Cook's personal decision to protect Doyle's image was responsible for the shorter class time, not Gavin's shirt. Gavin's shirt did not interfere with school work because it contributed to a beneficial class discussion on a topic that was relevant to the curriculum of the class and aligned with the School's educational mission.

Additionally, Gavin's shirt did not constitute an actual and substantial disruption because it did not invade the rights of others. Here, like the facts in *Tinker*, there were no threats or acts of violence; however, like the facts in *Tinker*, some students reacted with hostility to the students wearing the armbands, here, the School interpreted some students' responses to Gavin's shirt to be hostile. Reyes was the only student to refer directly to Gavin's shirt as "creepy." Reyes did later slap Gavin but stated that this was for reasons unrelated to the shirt. The School perceived some students to be pointing and saying things like "creep" and "weirdo" to Gavin but did not know if his shirt caused the comments. Even if it were clear

that the students were directing their comments at Gavin's shirt, these comments did not equate to threats or acts of violence. Since Gavin's shirt, at worst, caused hostile remarks from other students, it did not lead to threats or acts of violence. Because the shirt did not lead to threats or acts of violence, it did not invade the rights of others and, therefore, did not constitute an actual and material disruption.

Furthermore, Doyle did not cancel the Judge's talk because of material disruption. Doyle canceled the talk before she even arrived at the auditorium or saw Gavin's shirt. She did not rely on observing an actual disruption as her basis for canceling the talk since she did so before she arrived. While Doyle thought a disruption occurred in Cook's class based on their phone call, this was a misunderstanding. Cook told Doyle that Reyes had slapped Gavin but did not provide context as to why. Doyle relied on this slap as evidence of Gavin's shirt being disruptive when the slap was actually for unrelated reasons. Doyle canceled the talk based on a misunderstanding, not based on Gavin's shirt causing any disruption. Thus, a substantial disruption was not the basis for the cancellation. Gavin's shirt did not cause an actual disruption because the shirt neither interfered with school work nor invaded the rights of others.

B. The district court erred in finding that Gavin's shirt caused a reasonable forecast of material disruption because the School did not show a specific and constitutionally valid reason to anticipate a disruption.

The School did not show a specific and constitutionally valid reason to anticipate a material disruption. To prohibit student speech without an actual disruption, a school must show specific and constitutionally valid reasons to

anticipate that the prohibited speech would substantially interfere with the school's functioning. *Id.* at 509–511. While school officials do not have to wait until a disturbance occurs, the prohibition of speech based on a forecast of disruption must be reasonable and "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id*. at 510.

The School did not show a specific and constitutionally valid reason to forecast a substantial disruption because Doyle based her forecast on a distant and unrelated incident. When a school seeks to prohibit speech based on prior incidents, it must "point to a particular and concrete basis for concluding that the association is strong enough to give rise to a well-founded fear of genuine disruption." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002) (holding that, despite experiencing a pattern of disturbing racial incidents, a school was unjustified in prohibiting a student from wearing a shirt with the word redneck because the school did not show that the association between the prior instance and the shirt was strong enough).

Here, like the school in *Sypniewski*, which prohibited the shirt with the word redneck based on the school's history of disturbing racial incidents, Doyle based her ban of Gavin's shirt on a prior incident in which a group of students disrupted school by bringing nude paintings to school. In *Sypniewski*, a disturbing pattern of racial incidents was insufficient to support a school's prohibition of shirts with a race-related term. In that case, there was a relationship between the prior instances

and the School's prohibition because racial terminology could contribute to disturbing racial incidents. But here, there is no meaningful relationship between Gavin's shirt and the prior students' nude paintings. Here, the prior event involved nudity and a group of students, while Gavin's shirt was a silent display of a political opinion, and he was the only participant. The School's basis for prohibiting Gavin's shirt is even less concrete than the school's basis in *Sypniewski*. Accordingly, the prior incident of disruption that Doyle used to justify her forecast of disruption is not a constitutionally valid reason to forecast disruption.

Further, the School did not show a specific and constitutionally valid reason to forecast a substantial disruption because the school unreasonably assumed that Gavin's silent display of opinion would substantially interfere with the School's operation. Passive expression of one's viewpoint through clothing is not inherently disruptive and, therefore, cannot be suppressed absent a constitutionally valid reason to anticipate that it would lead to disruption. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992). In *Chandler*, school teachers went on strike, and in response, the school hired replacement teachers. *Id*. At 526. Students wore buttons in protest that referred to the replacement teachers as "scabs." *Id*. The Court held that although the buttons could be considered insulting to the teachers, the school officials could not have reasonably forecasted that they would disrupt the school's operation because the students silently conveyed an opinion in a non-disruptive manner. *Id*. at 530.

Here, Gavin's act of wearing a shirt, like the act of wearing a button in *Chandler*, was a way of silently expressing an opinion in a non-disruptive manner. The buttons in *Chandler* could have been insulting to the teachers. Likewise, Gavin's shirt could have insulted the Judge; however, this potential for insult did not support a reasonable forecast of disruption in *Chandler* and also did not support a reasonable forecast of disruption here. Judges have experience being around people who may disagree with their viewpoints. Here, the Judge would most likely not have even been insulted by a child's shirt, and even if he did take issue with it, he certainly would have kept his composure and not caused a material and substantial disruption. Concern that Gavin's political expression may be insulting is insufficient justification for forecasting a substantial disruption.

Also, the age of the students in the auditorium was not a constitutionally valid reason to anticipate a substantial disruption. *See Fraser*, 478 U.S. at 683 (holding that the maturity of the students exposed to speech is relevant in determining if it is appropriate for school officials to prohibit the speech). Doyle feared Gavin's shirt may have caused a disruption because sixth-grade students were in the auditorium. This forecast is unreasonable because the School is for exceptional students, has a rigorous admission process, and prides itself on teaching the students respect. The rigorous admission process means that only great students attend this school. A room full of exceptional students who survived a rigorous admission process and received lessons on respecting others' views would not become disruptive simply because they saw a shirt.

Because of the exceptional maturity of even the youngest sixth graders, there was no need for concern about the shirt affecting them. The students most likely would not have been affected by Gavin's shirt, and accordingly, the age of these students was not a constitutionally valid reason to anticipate a substantial disruption. Neither the prior unrelated incident, the potential insult to the Judge, nor the age of the students in the auditorium is a constitutionally valid justification for anticipating a material disruption. Therefore, the School did not show a specific and constitutionally valid reason to anticipate that Gavin's shirt would cause a substantial disturbance and the District Court erred in granting the School's Motion for Summary Judgment.

CONCLUSION

For the reasons stated herein, appellant respectfully requests that the Court reverse the district court's decision.

This is the 12th day of October, 2022.

Grace Kinley

Applicant Details

First Name	**Ross**
Middle Initial	**W**
Last Name	**Martin**
Citizenship Status	**U. S. Citizen**
Email Address	**rosswmartin@gmail.com**
Address	**Address** Street **36 Kensington Rd** City **Garden City** State/Territory **New York** Zip **11530** Country **United States**
Contact Phone Number	**19297991863**
Other Phone Number	**5168779028**

Applicant Education

BA/BS From	**Grinnell College**
Date of BA/BS	**December 2002**
JD/LLB From	**Other** **http://www.lawschool.edu**
Date of JD/LLB	**June 30, 2012**
LLM From	**University of California at Los Angeles (UCLA) Law School**
Date of LLM	**July 19, 2014**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Oxford University Commonwealth Law Journal** **Pacific Basin Law Journal** **Southampton Student Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Recommenders

Dillon, Michael
mickdill@hotmail.com
Snelling, Juliana
jsnelling@canterburylaw.bm
Jayousi, Areen
areen.jayousi@gmail.com

References

Please see attached.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 15, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

Thank you for giving me the opportunity to submit these materials in application for the judicial clerkship for which you are currently recruiting. I believe I would be the ideal candidate for this position.

I have had a diverse career in commercial litigation and arbitration over the past six years, much of it with considerable international elements. I have excelled in oral and written advocacy, and have been entrepreneurial in identifying law firms in considerable need of assistance, enabling me to take up different positions around the world while building a profile in international arbitration.

I recently completed the courses necessary to become a Fellow of the Chartered Institute of Arbitrators in London, which I was named this past September. These courses are designed to enable a fellow to sit as an arbitrator in a commercial dispute. In particular, Module 3, “Award Writing”, is designed to teach the candidate how to draft an arbitral award, and I performed admirably in this course, drafting a strong award capable of surviving judicial scrutiny.

Over the course of completing this course, I realized that my main goal in my legal career is to sit as a judge or as an arbitrator, and it is to that end that I am submitting this application for a judicial clerkship in your chambers. I believe I am a strong advocate for clients, but I believe my real talents lie in the equanimous application of the law.

I have taken the liberty of including the arbitral award I drafted last summer. This award far exceeds any page limit, but I think that it, more than anything I have ever written, demonstrates my ability to draft a reasoned judgment of the sort that I would be expected to draft in your chambers. In other words, as your clerk, I would be able to hit the ground running.

Best regards,

Ross W. Martin

Ross W. Martin

rosswmartin@gmail.com – +1 929 799 1863 – Citizenship: USA

Bar Admissions

- **New York**. Attorney. April 2016.
- **England and Wales**. Solicitor. November 2019. Current practicing certificate.
- **Astana International Financial Centre**. Rights of Audience. September 2021.
- **Washington State**. Attorney. January 2022.
- **England and Wales**. Barrister. Date of call: July 2022. Non-practicing.

Education

Chartered Institute of Arbitrators. International arbitration courses. 2021-2022. All three Modules complete. Admission to Fellowship (FCIArb): September 2022.

University of California, Los Angeles, School of Law. Master of Laws, 2014 – 2015. Concentration in American business law. Managing Editor: UCLA Pacific Basin Law Journal. Moot Court Honors Program.

University of Oxford. Bachelor of Civil Law (a highly advanced, post-J.D., common law degree), 2012 – 2014. Concentration in English and European commercial law. Associate Editor: Oxford University Commonwealth Law Journal.

University of Southampton. Bachelor of Laws (equivalent to a J.D.), 2010 – 2012. First Class Honours. Editor-in-Chief: Southampton Student Law Review.

University of British Columbia. Master of Arts. European Studies, 2004 – 2006.

Grinnell College. Bachelor of Arts. History and Western European Studies, 1998 – 2002.

Experience

Hecht Partners. New York. *Senior Counsel*. July 2022 – present. Commercial litigation, international arbitration, and investor-state dispute settlement. Engaged in research, drafted memos and briefs, managed own workload with little supervision, supervised one paralegal.

- Played important role in large investment dispute brought under bilateral investment treaty against a country in Central Europe. Conducted research concerning claims settlement treaties, *res judicata* effect of national judicial decisions in international law, legality requirement under bilateral investment treaty. Contributed text to reply brief on jurisdiction.

- Played important role in large investment dispute brought under Energy Charter Treaty against a country in Central Europe. Conducted research concerning expropriation, fair and equitable treatment standard.

- Played central role in large series of arbitration proceedings involving multiple claimants against a not-for-profit entity at AAA and JAMS.

Horizons & Co. Dubai. *Senior Associate*. July 2021 – July 2022. International arbitration and commercial litigation. Construction, commercial, company, and investment disputes. Undertook knowledge management project for firm. Managed one associate and three paralegals.

- *Construction Arbitration:*
    - Full care and conduct for medium-scale construction arbitration from start to finish without supervision. Drafted statement of claim, reply, costs submissions. Undertook correspondence with tribunal.
    - Played important role in large multi-party construction dispute pursuing encashment of performance bonds. Contributed significant work regarding back-to-back clauses.
    - Played important role in matter successfully resisting injunction preventing encashment of six performance bonds.
    - Drafted legal notice, notice of dispute, injunction application, and draft penal order in commercial construction dispute.
    - Drafted opinion, legal notice in large retail shopping mall dispute.
    - Contributed research, drafting to reply in construction dispute worth $80 million.
- *Commercial Arbitration:*
    - Full care and conduct for international corporate arbitration from start to finish without supervision. Drafted statement of claim, reply, costs submissions. Undertook correspondence with tribunal
    - Drafted injunction application, statement of case, affidavit, and draft penal order for important UAE ports facilities dispute.
- *Other:*
    - Contributed to Expert Opinion regarding UAE bankruptcy law. Provided answers to twenty-one specific inquiries and general matters. Principal responsible for most drafting elements.
    - Participated in representation of discharged employee in large employment mediation. Interviewed client, drafted and prepared most material relied upon.

Canterbury Law Limited. Bermuda. *Contract legal consultant.* July 2020 – June 2021. Associate-equivalent role completed remotely from New York due to COVID-19 pandemic. Undertaken on contract/per matter basis while taking courses in business and finance.

- *International insurance.* Participated in large insurance-industry arbitration concerning status of several insurance policies and status of Chief Underwriting Officer of an international insurance company. Drafted 150-page witness statement for CEO. Contributed heavily to submissions.

- *Employment.* Participated in several important employment disputes, including senior management and members of government. Drafted employee manuals, policy documents, and revised employment contracts incorporating legislative changes.

Urbanetic. Phnom Penh/Singapore. *Contract legal consultant*. February 2020 – June 2020. Advised multi-million-dollar block-chain software regarding smart cities project in Phnom Penh.

BNG Legal. Phnom Penh. *Legal counsel*. August 2019 – February 2020. Legal counsel at international law firm until COVID-19 outbreak. Managed General Practice and Myanmar teams, working exclusively for international clients. Broadened transactional experience while maintaining focus on international litigation. Engaged in substantial business development efforts.

- *Myanmar practice.* Engaged in substantial research concerning Myanmar company, investment, and commercial law. Participated in company registration in Myanmar. Engaged in research concerning company dispute in Myanmar. Participated in the sale of two ships from a Myanmar entity to an international entity.
- *Cambodian disputes practice.* Engaged in Cambodian litigation concerning a casino; engaged in Cambodian litigation concerning property disputes; participated in arrest of ship in Cambodian waters. Developed materials relating to international arbitration, including Cambodia's National Commercial Arbitration Centre.
- *Cambodian transactional practice.* Engaged in several land transactions; incorporation of non-profit entities; engaged in substantial research concerning mining industry of Cambodia; engaged in substantial research concerning arbitration and dispute resolution in Cambodia.

Adrian & Associates. New York. *Associate.* March 2018 – April 2019. Associate at boutique commercial litigation firm practicing complex commercial litigation, appellate litigation, securities class action defense, insurance coverage, corporate disputes, and alternative dispute resolution including arbitration. Clients include both international and domestic entities. Developed practical skills in litigation: drafting pleadings, motions, memoranda of law, stipulations, affidavits, attorney affirmations, discovery requests, oral argument on motions, and settlement conferences. Gained extensive experience in New York state and U.S. federal practice.

- *Securities Fraud.* Participated in the defense of President of Services in the *Oklahoma Firefighters Pension and Retirement System v. Xerox Corporation* class-action case heard at the Second Circuit Court of Appeals. Drafted extensive memorandum concerning the application of Federal Rule of Civil Procedure §12(b)(6) motions to dismiss.
- *Insurance Coverage*. Engaged in research and all procedural steps involved in successive appeals to the Appellate Division First Department and the New York Court of Appeals concerning the requirement of a finding of proximate causation by the primary insured before additional insured status can be claimed in regards to the duty to defend under an insurance policy.
- *Corporate litigation.* Held primary responsibility for a case concerning the formation of a small company and its alleged fraudulent misappropriation by several of its shareholders. Contributed to drafting of complaint. Drafted memorandum of law in opposition to motion for summary judgment and reply briefs.
- *Employment*. Drafted opposition to motion for summary judgment and reply briefs in case concerning termination of employment of a legal executive. Case concerned alleged mutual mistake and rectification of contract.
- *Appellate litigation*. Created documents initiating appeal in a case concerning pollution from the September 11, 2001, terrorist attacks. Drafted extensive memorandum concerning exclusion of liability for injuries caused by pollution. Participated in subsequent settlement negotiations, ultimately reducing client's liability significantly.
- *Arbitration.* Contributed research to extractive industry arbitration in Saudi Arabia.

McNair Chambers. Doha, Qatar. *Associate.* February 2017 – December 2017. Associate at prominent barristers' chambers practicing international commercial litigation, international commercial arbitration, investor-state dispute settlement, and public international law. Contributed research to several high-worth international arbitrations at ICSID, ICC, LCIA, QICCA and arbitrations under UNCITRAL rules, and researched UNCLOS rules. Contributed to several particulars of claim. Attended conferences, engaged in research for publication.

- *Public International Law.* Participated in the *Jadhav* case heard at the International Court of Justice in 2017. Researched law on consular access, clean hands doctrine, provisional measures in public international law. Additionally, conducted research on the Falkland Islands dispute.
- *Mining and extractive industries.* Engaged in research related to international investment law, mining of metals, political and social conditions in Pakistan, mining valuation and quantification.
- *Insolvency and Fraud.* Produced report on the cooperation between the Serious Fraud Office of the United Kingdom and authorities in an offshore jurisdiction concerning a multi-national insolvency and fraud case in the financial industry.
- *International investment.* Participated in initial stages of an arbitration related to expropriation, fair and equitable treatment, full protection and security concerning an investment in the Caribbean. Drafted demand letter and request for arbitration.
- *Arbitration Act 1996.* Examined implications of the recent *IPCO* decision by the UK Supreme Court concerning adjournment of proceedings in several cases.
- *Telecommunications.* Produced report on competition law issues regarding entrance into Qatari market, use of existing infrastructure. Contributed to draft of particulars of claim.
- *Shipping.* Researched issues relating to force majeure clauses in the shipping industry following the blockade on Qatar. Engaged in research related to US sanctions on Iran. Worked on arbitration related to loading dispute, participated in taking and drafting of witness statement.
- *Hospitality.* Researched issues related to enforcement of arbitral award of tribunal seated outside of the UK in English High Court and Court of Appeal related to the construction of a hotel in a third jurisdiction.

Deloitte. Jersey City, New Jersey. *Contract attorney.* April 2016 – February 2017. German-language document review pertaining to the Volkswagen Emissions Scandal. Learned management aspects of the automotive industry. Further developed German language skills.

Bar Exam Tutor. Tutor for New York Bar Exam for private clients and a company called LLM Bar Exam.

Forrest Solutions. New York, NY. *Paralegal.* September 2015 – October 2015. Extracted critical data from over one hundred employment contracts, helped build an online database.

Community Service Society. New York, NY. *Volunteer, legal team.* August – September 2015. Challenged denials of coverage by medical insurance companies. Drafted memo and external appeal.

California Court of Appeal. Los Angeles, CA. *Extern.* January – May 2015. Worked as legal extern under a research attorney for Justice Jeffrey Johnson. Researched appellate procedural law, demurrer pleading.

Barristers' Chambers. London. *Mini-pupil.* December 2012 – August 2013. Undertook ten short internships at top commercial and chancery barristers' chambers in London.

University of Southampton School of Law. Southampton, UK. *Research Assistant.* Summer 2011. Research assistant to Dr Özlem Gürses researching insurance and reinsurance law.

ESL Schools in South Korea, China, Ukraine, Germany. *English Teacher.* 2007 – 2010. Taught English to students ranging from children to business people. Developed learning materials. Traveled extensively in over 45 countries on four continents.

LANGUAGES:

German. Fluent, academic writing proficiency.

Spanish. Upper intermediate, actively learning.

CANTERBURY LAW LIMITED

CANTERBURY LAW LIMITED
BARRISTERS & ATTORNEYS
THIRD FLOOR, SWAN BUILDING
26 VICTORIA STREET, HAMILTON HM 12
BERMUDA
TELEPHONE: +1 (441) 296-8444
WEBSITE: WWW.CANTERBURYLAW.BM

MAIL:
PO BOX HM 2439
HAMILTON HM JX
BERMUDA

EMAIL: MAIL@CANTERBURYLAW.BM

March 8, 2023

To whom it may concern:

I am Bermudian by birth and am a Director of the law firm, Canterbury Law Limited, a civil and commercial law firm in Bermuda where I practice employment law and related commercial dispute resolution. I have been practicing law in Bermuda for 27 years and I am a Rhodes Scholar. I am writing this letter to enthusiastically recommend Mr. Ross W. Martin.

Ross worked for me remotely from July 2020 to July 2021 as a consulting/contract attorney, assisting me on multiple matters, most notably a large employment arbitration pertaining to the work of an insurance company headquartered in Bermuda. Ross reached out to me in early 2020, and I was immediately impressed not only by his qualifications but also by his entrepreneurial nature and willingness to seek me out. We worked out an arrangement whereby he worked for me remotely, checking in with me on a daily basis.

In our large arbitration, Ross was tasked with drafting the witness statement for the CEO of this insurance company and contributing substantively to legal submissions. Ross was readily able to win the confidence of the CEO with his professional demeanour and willingness to learn the business of insurance and learn how decisions are made on both qualitative and quantitative levels. The lengthy and detailed witness statement he drafted was of exceptional quality.

His contributions to our submissions were excellent, and demonstrated considerable research skills and genuine understanding of the relevant legal issues. Legal research in Bermuda is not easy; although the law of Bermuda and the Caribbean is based on common law principles, databases are poorly organized and significant effort is required to identify authority applicable to a case. Ross was readily able to adapt to this practice.

Finally, I was impressed with Ross's teamwork skills. He worked relatively autonomously, but made sure I was aware of the work he was undertaking and how he was progressing. In his daily debriefing emails to which he attached his work product, he was able to describe what he had accomplished, candidly explain its strengths and weaknesses, and identify where he needed guidance and supervision without ever having me feel burdened. He is personable and friendly, and was a pleasure to work with.

Ross has proven to be a dependable lawyer with a passion for his work. Should you wish to inquire further about his qualifications, please feel free to contact me.

Sincerely,

Juliana Marie Snelling
+1 (441) 505-6131
jsnelling@canterburylaw.bm

IN THE MATTER OF AN AD HOC ARBITRATION UNDER THE UNCITRAL RULES 2013, AS AMENDED

Between:

Tarens Construction Ltd

Claimant

and

Pryontics Ltd

Respondent

FINAL AWARD

Claimant's Representatives:
Advocate Chloe Burns

Respondent's Representatives:
Advocate Abdullah Rahmanovich

Arbitrator:
Dr Dara Nagambi

TABLE OF CONTENTS

INTRODUCTION AND BACKGROUND TO THE CLAIM

1. The Claimant party, Tarens Construction Ltd, Registered Number N3327876, with registered office at The Yard, Northampton, Northistan, 88354, is a company incorporated under the laws of Northistan. It describes itself as a family-run construction firm and has the role of contractor in the Northistan electricity substation project (the "Project").

2. The Respondent party, Pryontics Ltd, Northistan, Registered Number SL23332, with registered office at Hertha Ayrton Towers, Southsea, Southland, 25345, is a company incorporated under the laws of Southland. It has the role of employer in the Project.

3. These parties (the "Parties") are in dispute. The uncontroversial background to their dispute is as follows. The Parties are commercial actors represented by counsel, and it is appropriate that uncontested facts be taken as admitted.[1]

    3.1. The Parties entered into a contract (the "Contract") on 1 July 2020 under the laws of Northistan to build an electricity substation in Northistan. The contract was formally titled "Build Contract NISTN/40034/22". The Contract included terms for the payment of an Advance Payment of N$2,000,000 "*as an interest-free loan for mobilisation*" and the payment of 48 monthly interim payment certificates of N$500,000 on or before the 28th of each calendar month on submission of duly certified IPCs before the 23rd day of that money. The Contract included terms for Determinations by the Engineer; variations by the Engineer and the Contractor; procedures for approval of variations; the Contractor's entitlement to suspend work; and termination by the contractor.

    3.2. The Respondent paid an advance of N$2,000,000 to the Claimant upon the execution of the Contract by the Parties on 1 July 2020. Mobilisation took place between 1 July 2020 and 31 July 2020, and work started on 1 August 2020.

    3.3. The Respondent provided design work to the Claimant at the beginning of the Contract.

    3.4. The Respondent at some point thereafter modified the contact in such a way as to render the design impossible to execute in regards to Tank Room No. 8.

    3.5. The Claimant notified the Engineer on 5 October 2020 of what it believed were problems with machinery fitting in Tank Room No. 8.

    3.6. On 8 October 2020, the Claimant submitted a Value Engineering Variation request to the Engineer.

    3.7. On 10 October 2020, the Engineer replied to the Claimant, saying that the Claimant was not responsible for design work and had to build as designed.

[1] *Harris International Communications v Islamic Republic of Iran*, Award No. 323-409-1 (November 2, 1987), reprinted in Iran-US CTR 31, 47 (1987-IV)

3.8. On 1 November 2020, the Claimant gave instructions to its team to proceed with changes to Tank Room No. 8.

3.9. On 3 November 2020, the Claimant wrote to the Respondent to explain its perspective on what had gone wrong, and to request N$1,000,000 for what it claimed was reimbursement for its costs.

3.10. At some point soon after 3 November 2020, the Respondent replied to the Claimant, stating that the changes were unsolicited, and refusing payment or Variation order.

3.11. On 28 January 2021, the Respondent failed to pay IPC No. 5, and subsequently failed to pay IPCs Nos. 6, 7 and 8 as they became payable.

3.12. On 25 February 2021, the Claimant gave notice to terminate the Contract.

3.13. On 1 May 2021, the Claimant terminated the contract.

3.14. On 7 June 2021, the Claimant made an offer to the Respondent to settle the dispute for N$3,000,000. The Respondent refused this offer, and threatened to cash the letter of credit.

3.15. 15 June 2021, the Respondent made a without prejudice settlement offer to settle the matter with the Claimant for N$1,000,000. On 16 June 2021, the Claimant rejected this letter.

3.16. On 20 June 2021, the Respondent made another settlement offer for N$1,500,000. On 1 July 2021, the Claimant rejected this offer.

3.17. On 1 July 2020, the Claimant filed a Notice of Arbitration in which the name of the Respondent was written as "Pyrontics Ltd, Northistan" three times: in the carbon-copy recipient list; in the body of the email; and in the table of contact details for the Parties. This was accompanied by an apparent misspelling of the name of the CEO of the Respondent; in the email this individual was identified as "Marco Pyro", whereas in subsequent correspondence, this individual was identified as "Marco Pryon".

4. I shall set out the relevant operative provisions of the Contract below, as and when they become material. For present purposes it suffices to note Sub-Clause 21.2 of the Contract (the "Arbitration Clause"), contains an agreement to submit all disputes arising out of or connection with the Contract to arbitration. The Arbitration Clause in full provides:

> **21.1 If the Parties agree to constitute a Dispute Board, and the Dispute Boar fails to render a decision within 100 days of the constitution of the Dispute Board, either Party may initiate arbitration.**
>
> **21.2 Provided that no Dispute Board has been constituted, or that the Dispute Board has failed to render its decision within 100 days of constitution, all disputes arising out of or in connection with this Contract shall be finally resolved by**

> **binding arbitration on an ad hoc basis between the parties to this Contract, in Easthead under UNCITRAL Arbitration Rules. A sole arbitrator will be appointed by the Easthead Arbitration Institute, (EAI), in its capacity as appointing authority. The language of arbitration shall be English.**

5. In short summary, the Claimant alleges that:

   5.1. the Respondent is liable for the cost of the variation works it made to Tank Room No. 8, for a cost of N$1,000,000, due to the Engineer's failure to deal with the matter; and

   5.2. the Respondent owes N$500,000 on IPCs Nos. 5, 6, 7, and 8, for a total of N$2,000,000, due to the Respondent's failure to pay on these IPCs as they allegedly came due.

6. The Respondent disputes the allegation, arguing that:

   6.1. the works done by the Claimant to Tank Room No. 8 were unsolicited, and thus that no monies are due for those works.

   6.2. the Advance of N$2,00,000 covers the 4 unpaid IPCs.

7. The Parties, are, however, in agreement that:

   7.1. the Arbitration Clause as written above is correct and applies to the dispute that has arisen between them;

   7.2. the seat of arbitration is Easthead;

   7.3. the Easthead Arbitration Institute (EAI) shall be the appointing authority, by virtue of Sub-Clause 21.2 of the Contract;

   7.4. the language of the arbitration shall be English, by virtue of Sub-Clause 21.2 of the Contract;

   7.5. the UNCITRAL Arbitration Rules, 2013, as amended, apply by virtue of the Arbitration Agreement

   7.6. the IBA Rules of Evidence 2020 apply by consent.

PROCEDURAL HISTORY

8. As noted above, the Claimant began the arbitration process by filing, via its representative, a Notice of Arbitration with the Easthead Arbitration Institute in its capacity as appointing authority and the Respondent on 1 July 2021.

9. The EAI contacted me via email on 5 July 2021 to propose to nominate me for the position of arbitrator in its capacity as appointing authority under Sub-Clause 21.2. They attached their form, "Conflict Check and Availability Form Arb," and requested that I return it via email.

10. I considered whether there might be any conflicts of interest or any other reason why I should not accept the appointment. Having concluded there were no such reasons, I wrote back to the EAI on 6 July 2021 to accept the nomination and to confirm that I considered myself suitably qualified. In this communication, I noted that I had been unable to find "Pyrontics Ltd" on the Southland Companies Register, but that I had found "Pryontics" at the same address. I stated that I assumed this had been a typographical error.

11. The EAI wrote back to me on 12 July 2021 to confirm that it had received my documents. The EAI stated that it would write to the Parties on 15 July 2021 to officially notify the Parties of my notification; the EAI stated that this would constitute my appointment date. The EAI thanked me for pointing out the error in the Respondent's Company name and stated that the EAI had corrected it in the EAI's records.

12. The EAI wrote to the Parties and to me on 15 July 2021, stating that it acknowledged the Claimant had commenced arbitration against the Respondent, identified as Pryontics Ltd, and attaching the Notice of Arbitration email. The EAI further stated that it had named me as arbitrator in this arbitration, pursuant to Sub-Clause 21.2 of the Contract.

13. Later that day, I emailed the parties and the EAI to acknowledge the EAI's email and my appointment as sole arbitrator in the present dispute. I proposed a Procedural (or, preliminary) Meeting for 25 July 2021, to be held virtually at 2 PM. I attached my terms of appointment, which I requested the Parties sign and return to in advance of the Preliminary Meeting; I noted the requirement of an advance on my fee, which was required to be paid equally by each party in advance of the Preliminary Meeting.

14. Following this email on 15 July 2021, the CEO of the Respondent, Marco Pryon, emailed me, counsel for the Claimant, and the registrar for EAI stating the arbitral tribunal had not been properly constituted due to the jurisdictional challenges the Respondent later brought.

15. In response to this email, on 15 July 2021, I replied to the CEO of the Respondent, stating that, as I had been appointed as an arbitrator, I would deal with this under my authority as given in the rules and law, while giving the Respondent ample opportunity to state any objections to my jurisdiction.

16. The Preliminary Meeting was duly held on 25 July 2021.

17. At the Preliminary meeting, counsel for the Parties confirmed that the Arbitration Clause within the Contract was as communicated to me by the EAI and sent an agreed copy of the Contract. The Parties confirmed that the seat of arbitration is Easthead. The Parties agreed that the substantive law of the Contract was that of Northistan and agreed that both the Contract and the Arbitration Agreement were valid. At my request, the Parties also agreed that the IBA Rules of Evidence would be accepted as binding in this arbitration.

18. The Parties also agreed:

    18.1. A costs cap on party costs of E£500,000 per party total would apply;

18.2. Costs of and occasioned by the preliminary meeting were to be costs in the arbitration

18.3. All communications to me by either party shall be copied to the other party and marked to that effect.

18.4. The currency of the Award was to be Easthead Pounds (E£)

18.5. Exchange rate was to be fixed at 1 N$ = 1.5 E£.

18.6. Both Parties would be allowed to appoint expert witnesses.

19. The Parties agreed on this timetable:

01.10.21	Statement of Claim
01.11.21	Statement of Response and Counterclaim
01.12.21	Statement of Response to Counterclaim
06.01.22	Cut-off date for evidence
08.01.22	Claimant to submit an agreed core bundle of documents for the hearing.
10-13.01.22	Hearing and Witness statements

20. At this the Preliminary Hearing, the Respondent raised jurisdictional challenges regarding the name with which it was identified in the Notice of Arbitration and the effect of provisions in the Arbitration Clause allegedly requiring escalation.

21. On 25 July 2021, after the Preliminary Hearing, I issued "Order for Directions No. 1" reflecting the agreed matters.

22. Specifically, Order for Directions No. 1, dated 25 July 2021, set out:

22.1. Parties agree that the substantial law applicable to the merits of the dispute are the laws of Northistan;

22.2. Parties agree that the seat of arbitration is Easthead;

22.3. Parties agree that UNCITRAL Rules 2013, as amended, apply by virtue of Sub-Clause 21.2

22.4. Parties agree that the IBA Rules on the Taking of Evidence in International Arbitration, 2020, shall apply to this dispute.

22.5. All communications, statements, and evidence to be submitted to the other Party and to the Arbitrator via email to these addresses: dara@ngambilaw.co.ea, Chloe Burns of 5th Chambers Northampton, and Abdullah Rahmanovich of Rahman Law Southsea.

22.6. Claimant to submit its Statement of Claim on or before 01.10.21.

22.7. Respondent to submit their Reply to Statement of Claim and Defence on or before 01.11.21.

22.8. Claimant to submit Statement of Response to Counterclaim by 01.12.21.

22.9. Cut-off date for submission of evidence set as 06.01.22

22.10. Written witness statements due 10 January 2022.

22.11. Hearing and oral testimony of witnesses to take place from 10 January 2022 to 13 January 2022.

23. Prior to the Hearing, the Parties were to pay an advance on my fee, to be paid equally by each party in advance of the Preliminary Meeting.

24. The Pre-Hearing meeting was held on 8 January 2022, where arrangements to have summing up rather than closing statements, and for closing statements be given in the form of Post Hearing briefs along with costs sheets. An agreement was made on the structure of the hearing.

25. In accordance with the Order for Directions No. 1, a hearing was held on 11 January 2022, 12 January 2022, and 13 January 2022. The Claimant was represented by Chloe Burns as counsel and Jacob Tarens as company representative. The Respondent was represented by Abdullah Rahmanovich as counsel and Marco Pryon as company representative. The hearing was completed within the four allocated days and I thank the parties and their representatives for the efficacy with which the hearing was conducted.

26. I shall deal with the evidence given before me below, but I shall here record the evidence received at the hearing:

26.1. The Claimant called the following witnesses, who attended for cross-examination upon their statements and expert reports respectively, exchanged in accordance with Procedural Order No. 1:

26.1.1. Jacob Tarens, Managing Director

26.1.2. Mary Bell, Secretary to Jacob Tarens

26.1.3. Evan Llywd, expert in delay damages and commercial financing

26.2. The Respondent called the following witnesses, who attended for cross-examination upon their statements and export reports respectively, exchanged in accordance with Procedural Order No. 1:

26.2.1. Marco Pryon, CEO

26.2.2. Lesley Randal, Engineer